Supreme Court, U.S.
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NO. 93 1136

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

E. ELIZABETH TURNBULL, DAVID E. SIBLEY, EUGENE M. PARRISH, AND THE ESTATE OF LOUIS R. KOERNER

Petitioners,

VERSUS

THE HOME INSURANCE COMPANY AND THE GRAHAM COMPANY.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should a non-moving party in a motion for summary judgment be permitted, on motion for reconsideration or in the court of appeals, to assert, even for the first time, a dispositive legal theory supported by the existing summary judgment record or by material actually in the existing district court record but first brought to the attention of the district court on reconsideration?

Did the court of appeal adhere to the standard of review, established by this Court and utilized in the other circuits, in order to determine whether the interests of justice required that an implicit or newly asserted legal theory, that was fully factually supported and briefed, be considered and a determination made of whether the legal theory conclusively defeated summary judgment?

PARTIES TO THIS PROCEEDING

Petitioners/Plaintiffs:

E. Elizabeth Turnbull, David E. Sibley, Eugene M. Parrish, and the Estate of Louis R. Koerner

Counsel for Petitioners:

Louis R. Koerner, Jr.

Defendants/Respondents:

The Home Insurance Company and the Graham Company

Counsel for Respondents:

Steven A. Jacobson
J. Walter Ward, Jr.

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Abbott v. Equity Group, Inc., C.A. No. 86-4186 (United States District Court, Eastern District of Louisiana, March 13, 1991) (Amendment to Written Reasons). Unreported and at A102-105.

Abbott v. Equity Group, Inc., C.A. No. 86-4186 (United States District Court, Eastern District of Louisiana, January 30, 1992) (Final Judgment) Unreported and at A106-114.

Abbott v. Equity Group, Inc., C.A. No. 86-4186 (United States District Court, Eastern District of Louisiana, March 11, 1992) (Minute Entry denying motion for new trial) Unreported and at A115.

Abbott v. Equity Group, Inc., C.A. No. 86-4186 (United States District Court, Eastern District of

Louisiana, December 9, 1991)) (Minute Entry denying motion to supplement the record) Unreported and at A116.

APPELLATE COURT:

The opinion of the United States Court of Appeals for the Fifth Circuit is reported 2 F.3d 615 and Appendix at A-4-67.

The order of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing and for rehearing *En* Banc is reported at ___ F.3d ___ and Appendix at A-117-118.

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision below on September 28, 1993 and denied the application for rehearing on November 12, 1993.

STATUTES INVOLVED

Section 10(b), 15 U.S.C. § 78j(b.

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national security exchange:
>
> (b) To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance....

Section 20, 15 USC § 78t(a).

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . .

Rule 10b-5, 17 C.F.R. § 240.10b-5 (1992.

> It shall be unlawful for any person, directly or indirectly ...
>
> (a) to employ any device, scheme, or artifice to defraud,
>
> (b) to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statement made, in light of the

circumstances under which they were made, not misleading or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 10b-9, 17 C.F.R. § 240.10b-9 (1992):

It shall constitute a *manipulative or deception device or contrivance,* as used in section 10(b) of the Act, for any person, directly or indirectly, in connection with the offer or sale of any security, to make any representation:

. . . . .

(2) to the effect that the security is being offered or sold on any other basis whereby all or part of the consideration paid for any such security will be refunded to the purchaser if all or some of the securities are not sold, unless the security is part of an offering or distribution being made on the condition that all or a specified part of the consideration paid for such security will be promptly refunded to the purchaser unless (i) a specified number of units of the security are sold at a specified price within a specified time, and (ii) the total amount due to the seller is received by him by a specified date.

STATEMENT OF THE CASE

The court of appeal, 2 F.2d 613, 615, A-5, stated:

> Investors in Courtside Ltd., a Louisiana partnership formed to acquire and operate an apartment community in Houston, Texas, brought suit against, *inter alia*, The Home Insurance Company and The Graham Company. As to them, they alleged that Home and Graham's continued participation as surety and bonding agent respectively for the Courtside transaction, despite their knowledge of misrepresentations and material omissions in the Private Placement Memorandum, violated, *inter alia*, federal securities laws and rendered the investors' indemnity agreements with Home unenforceable. The district court granted summary judgment in favor of Home and Graham and refused, post-judgment, to allow a new theory of liability to be raised. We AFFIRM.

After settlement with the Equity Group and other defendants and on the eve of trial, the district court reconsidered Home/Graham's previously denied motion for summary judgment, and granted it, stating that it would later assign written reasons. These written reasons [A68-101], issued four months later, were amended [A102-105] to remove references to a district court opin-

ion reversed, in the interim, by the Second Circuit Court of Appeal.

Within ten (10) days after entry of judgment, Petitioners moved for reconsideration under Rule 59(e) (A106-114). Prior to the hearing, Petitioner, Turnbull, moved to file a supplemental memorandum urging, for the first time, the application of Rule 10b-9 to undisputed facts. Reconsideration was denied on March 11, 1992 (A115) as was Turnbull's motion to supplement the record (A116). The district court refused even to consider the Rule 10b-9 theory. The opinion of the court of appeal, affirming this action of the district court, was issued on September 28, 1993 (A4-67). Rehearing and rehearing *en banc* were denied on November 12, 1993. Stay of the mandate was granted to December 31, 1993. An additional stay to January 15, 1994 was denied. The mandate has since issued.

STATEMENT OF NECESSARY FACTS

SYNOPSIS OF THE FACTUAL CHRONOLOGY

DATE	*DESCRIPTION*	*REC/REF*[1]
7/11/84	Private Placement Memorandum (PPM) issued by Equity and its counsel.	
9/4/84	Issuance to Equity of Graham Letter of Indication for Financial Guaranty Bond for Courtside.	R.14529-30
9/20/84	Duane Memorandum regarding potential Securities Laws violations prepared by Donald Auten at Graham's request.	R.12030
9/25/84	Forwarding of the Duane Memo by Graham with comments in a cover letter to Equity.	R.12054
10/18/84	Real estate closing for purchase of Courtside.	R-18306
	Formation of Courtside partnership and Sales of first units to limited partners.	R-18350, R.14550

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[1] Record References prior to the 18,000 series are to the summary judgment record established by plaintiffs prior to the filings made by Turnbull.

11-12/84	Glick of Graham and Equity principals have weekly or bi-weekly discussions of partnership closings, number of units sold, and close out dates. Glick and Equity contemplate that the close-out date would be able to be extended past 1/24/85.	R-18674; R.14550
12/4/84	Expiration of Graham Letter of Indication for Home surety bond.	R.14529-30
12/28/84	Date of issuance by Home of surety bond in favor of Hibernia Bank with 25% of units unsold.	R.12358
1/85	Consideration is given to extension of the closing date but Hibernia declines because Hibernia is advised by its counsel of the right of rescission. Equity was aware of this right. Glick of Graham is aware of interim closing dates, admission of partners, and of right of rescission and of consequences of same; Fullmer discusses alternatives in event of failure to reach stated number of units by termination date.	R-18632-34, 18636-38, 18651-53, 18675-82; 13084

	Discussion by Strauss of Equity with Glick of Graham relative to formation of partnership to purchase remaining units; Discussion of one 40 unit "EC" partnership of Equity principals; Refusal by Home to bond single "EC" partnership; and alternative of four partnerships also made up of Equity principals, with investor notes guaranteed by Home.	R-18576-77, 18587-88, 18660-61
1/18/85	Formation of the four "EC" partnerships and Second Supplement to PPM and revelation of EC partnership purchases of remaining units.	R-57-18348-49
1/24/85	Hibernia loans the EC partnerships the "cash portion" of their Courtside investment.	
	The date for completion (Termination Date) or rescission of the "part or nothing" offering.	A70
2/25/85	Date of issuance of EC partnership bond by Home.	
3/6/85	Graham Memo from Pine to Glick adverting to Courtside crises and representations to Hibernia.	R.14552
1/29/86	The date of revelation of failure and likely bankruptcy of the Courtside venture.	

NARRATIVE SUMMARY OF PARTICIPATION OF HOME/GRAHAM

On September 4, 1984, Glick issued, on Graham stationery, a "Letter of Indication for Financial Guaranty Bond for Courtside, Ltd." that expired on December 4, 1984 unless extended. One requirement was:

> 7. The Company [Home] shall receive an acceptable opinion letter from counsel for the Partnership, which shall include the matters listed on Exhibit 1.

Exhibit 1 [R.14531] provides that "As a precondition for the issuance of the above-mentioned bond, your counsel **must give** his written opinion as to the following points: . . . 6) Counsel's lack of knowledge of any material misstatements or omissions in the Offering Memorandum." Home/Graham also had their own counsel review the deal.

According to the district court [A71]:

> Graham, Home's agent, analyzed the transaction for Home to determine whether Home should issue the bonds and whether Home should accept the risk of paying for future defaults. Graham sent a copy of Equity's Private Placement Memorandum ["PPM"] to the law firm of Duane, Morris & Heckscher ["Duane Morris"] for review. Follow-

ing its review of the PPM, Duane Morris prepared a fourteen (14) page memo of comments and criticisms which was forwarded to Graham, and then to the Equity defendants. **Not all of the comments and criticisms contained in the Duane Morris memorandum were incorporated into the supplemental PPMs.** [Emphasis added.]

The Duane Memorandum, dated September 20, 1984, discussed numerous violations of the securities laws in the PPM arising from non-disclosures and probable misrepresentations that proved remarkably prescient. At ¶ 6, pages 5-6, the Duane Memorandum described the scheme and motivation for Home/Graham to subsequently violate the securities laws:

> 6. The PPM makes clear that closing on the offering may be extended beyond October 1, 1984, to January 24, 1985. However, at page 42 of the PPM, it is stated that the Partnership may hold an interim closing at anytime and purchase the Project, even though less than 146 Units are sold, provided the Managing General Partner is obligated to purchase any remaining units (up to the minimum of 146) on January 24, 1985 ***This procedure creates a serious risk to the investors as well as to the Surety.*** Because the offering may close and the Project may be purchased with far fewer than 146 units having been sold, **if the Managing General Partner were to become financially embarrassed between October 1, 1984, and January**

24, 1985, the investors and Surety could be left in an unacceptable position The procedure described above should be changed, whereby if closing on the Project takes place before the minimum of 146 Units are sold, the Managing General Partner is *required to put funds in escrow* (or furnish an irrevocable letter of credit) to guarantee that on January 24, 1985, the Managing General Partner will be able to satisfy its obligation to purchase the remaining Units. ***The existing procedure completely undermines that concept of requiring a minimum number of units to be sold before closing can take place.*** Also, the disclosure on page 62 would seem inconsistent with the disclosure on page 42, insofar as the former states that capital contributions of at least $6,672,200 must be received before the Partnership may commence. [Emphasis Added.]

The Courtside offering was "part or nothing" as described in and regulated under Rule 10b-9. Without mentioning Rule 10b-9, the Duane memo cast the procedure in the PPM in 10b-9 terms, described the several objectives and *per se* violations of this regulation, and recommended an alternate procedure that could have resulted in compliance, had it been used.

Although the content of Duane Memo was almost immediately orally disclosed and then forwarded in written form to Equity and to its attorneys by Glick of

Graham with comments in a cover letter, R.12054, the problems discussed at ¶ 6 were not rectified. The offering proceeded not only with many important misrepresentations and non-disclosures uncorrected but in a manner totally in violation of § 10(b) under Rule 10b-9 and Rule 10b-5.

Although there was apparently another discussion with the author of the Duane Memo in October 1984 in regard to assisting local counsel, Mark Fullmer, with needed changes, this did not result in any change to the improper closing procedures.[2]

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[2] Rather, by Memo dated October 15, 1984, Tom Pine of Graham acknowledged that although sales were "only 25%", there was to be a partnership closing before the end of October (R.14550). Pine noted to Glick, under the heading of Courtside, Ltd., the following: "Draft of Legal Opinion -- contact Mark Fullmer" (outside counsel for Equity Group). Mark Fullmer was also noted to be the contact person as to "Status of supplement." Pine noted that "Hopefully, you have time to

Although Fullmer was an experienced securities lawyer who undoubtedly understood the description at ¶ 6 of the Duane Memo as a 10b-9 violation or as an invitation to rescission (R.13084), he neither altered the PPM nor changed the procedure so that it did not violate 10b-9. Given this preamble and despite the significance given by the district court [A84-85], the 10b-5 violation created by the 10b-9 violation is most evident in the legal opinion of Fullmer's law firm.

Only three days later, on October 18, 1984, the Courtside partnership was formed and the Courtside apartment complex in Houston purchased for $10,162,843. Equity had received a $7,767,836 loan to purchase the property on the strength of only ten in-

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make an initial call to Mark Fullmer since this is the first Home Ins. Co. deal . . ." (although this was far from the first Graham/Equity Group deal. Graham had, at that time, participated on 12-14 projects with the Equity Group.) Fullmer's ultimate opinion letter merely parroted the Home form. Record Dkt. 667, Ex. G. to the Glick Affidavit.

vestors admitted to the partnership. Such a large commitment of funds with so few investors securing it put Hibernia National Bank ("Hibernia"), the lead lender, at tremendous financial risk that could be relieved only by an immediate full subscription or issuance of surety bonds. The Surety (Home), in turn, would become burdened with the very risk of enormous financial loss that was predicted in the Duane Memo. Coinciding with these events was the first documented use of investor funds, itself a violation of Rule 10b-9. Since the offering was far from complete, rescission was still possible. If Equity had spent the investor down payments, however, it would leave no ability to return the money upon rescission. This too was predicted in the Duane Memo.

During November and December, Graham's Glick and Equity principals had weekly or bi-weekly discussions concerning partnership closings, number of units sold, and Termination Dates. Although Glick and Equity contemplated that the final Termination

date could be extended, Hibernia objected, and this plan had to be abandoned. A second closing on November 18, which resulted in payment of fees to Equity and further failure to escrow funds, constituted the second violation of Rule 10b-9. On November 19, 1984, a $3,030,000 loan from Hibernia was obtained and funded in the amount of $1,100,000.

December 4, 1984 was the expiration date of Graham's commitment for the two Home Surety Bonds. Graham's letter had provided that "in the event that the Partnership or General Partner seeks an extension of this letter, the Company may grant or refuse such extension in its sole discretion." Despite Graham's ability to prevent the further likely violations of 10b-9, nothing was done. Home did not require rescission as 10b-9 mandated but, on December 28, 1984, issued its first surety bond in favor of Hibernia with at least twenty-five percent of the offering units left unsold.

The issuance of this bond was the essential step in evading the clear mandate for rescission.

Home/Graham were thereby placed in a position in which they had to avoid rescission at any cost. If the investors were rescinded their purchases, Home/Graham had nowhere to turn for repayment.

Although rescission was an option which had been discussed, Glick of Graham apparently felt that extension of the final closing date to permit the sale of more units was likely enough to justify Home's issuance of bonds and acceptance of the $257,060 in premiums of which Graham was to receive 25% ($66,265). When Hibernia refused to agree to the extension of the Termination Date upon its attorneys' advice that an extension would require that the investors be granted a right of rescission, this threatened financial disaster with $4,941,075 of possible claims by the banks.

Everyone was aware of the right to rescind and of the dire financial consequences. Clearly, something had to be done to salvage the project and dispose of the remaining units before the offering's final Termination.

Fullmer discussed alternatives in the event of failure to complete the offering. Strauss of Equity and Glick of Graham discussed forming a single partnership to purchase the remaining 40 units. When Home refused to bond the single "EC" partnership, because of the financial instability of the Equity principals, Strauss and Glick decided upon the alternative of four "EC" partnerships, with qualified outside investors joining Equity principals and with notes guaranteed by Home.

The four "EC" partnerships were formed on January 18, 1985 for the purchase of the remaining units. The Second Supplement to the PPM was issued that same day. On January 24, the Termination Date, Hibernia loaned the EC partnerships their initial "cash" payments. The indemnity agreement to Home was then signed.

On March 6, 1985, Tom Pine of Graham addressed another memo to Glick, R.14552, in part, as follows:

3. Ethical and business considerations regarding the . . . representations to Hibernia Bank concerning Courtside.

6. Reaction to the Home Insurance Company -- positives & negatives compared to A.I.G.,

etc. Anything that he doesn't like? Without Home, Courtside wouldn't have been done.

8. What crises were created by Courtside and are the crises all past tense?

These statements, as analyzed below, constitute important evidence to a jury:

3. Ethical and business considerations regarding the . . . representations to Hibernia Bank concerning Courtside.

What "representations" were made "to Hibernia Bank concerning Courtside?" Were (mis)representations made in order to quiet fears of Hibernia's securities attorney and to prevent rescission or for other improper reasons? If these representations were improper either as to their truth or their business ethics, are not such representations consistent with Home/Graham's alleged role as controlling person or aider and abettor?

6. Reaction to the Home Insurance Company -- positives & negatives compared to A.I.G., etc. Anything that he doesn't like? Without Home, Courtside wouldn't have been done.

A.I.G. is the parent of National Union who had issued bonds on other Equity projects, and for whom Gra-

ham was formerly a general agent. Does this statement mean that National Union would not have gone along with an underwriting involving such obvious violations of 10b-5/9 as were exposed by the Duane Memorandum, but that Home did? Did the fact that Graham performed the reviews of investor applications for Home (Affidavit of Glick, at ¶ 7) mean that National Union would not have approved the investors in the EC partnership arrangements and so forced rescission? Did Home react passively to the Duane Memorandum, while National Union, perhaps more experienced with Equity's abilities, would have insisted on corrective action?

8. **What crises were created by Courtside and are the crises all past tense?**

If Home feared liability without recourse to the investors because the securities laws mandated rescission, this would certainly be a "crisis" consistent with plaintiffs' theory of the case. A jury could conclude that Home/Graham avoided the damaging impact of these "crises" by requiring Equity to enter upon the formation of the E-C partnerships, encouraging Hibernia to lend

the additional funds, and assisting in the non-bona fide sales of the remaining units. A jury could properly conclude that this constituted a rescue "from the brink of financial disaster with the declared objective of preserving the enterprises," and so inferred knowledge. When, as here, Home/Graham initiated the EC partnerships' transaction and had specific knowledge of the securities violations attendant thereto, there was a duty to disclose and a direct violation of Rule 10b-5, even though Home/Graham alleged that they had no direct relationship with the investors. *Arthur Young & Co. v. Reeves*, 937 F.2d 1310, 1329-31 (8th Cir. 1991). Moreover, "It is not uncommon for a person to be held in both primary and secondary capacities." Loss, *Securities Regulation* (3d Edition 1991), Vol. IX, at 4481.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

A writ of certiorari should be granted in this case for the following reasons:

(1) This decision is in conflict with decisions of this Court and with decisions of various cir-

cuit courts of appeal on whether or not to permit a new and dispositive theory, fully supported by facts already in the record and fully briefed, to be urged upon reconsideration of the grant of summary judgment or on appeal.

(2) The court of appeal departed from accepted and usual course of judicial proceedings in its failure to enforce these standards and sanctioned such a departure by the district court, particularly in the refusal by both courts to even consider the 10b-9 theory, so as to require review by this Court.

(3) The decision below represents important questions of federal law as to which this Court has not recently rendered a decision. The court of appeal decision conflicts with the rule in this Court and in other circuits.

ARGUMENT AND AUTHORITIES

I. THE DISPOSITIVE NATURE OF THE RULE 10b-9 ARGUMENT

A. Authority on the Rule 10b-9 Violations

Courtside was a "part or none" offering (146 units of a possible 150 were required to be sold). Rule 10b-9 required rescission be offered because of two impermissible changes: (1) the price of the units was reduced for the later investors, indicating the "market" rejected the

issue in its original issue; (2) the newly formed E-C Partnerships were formed to purchase the remaining units needed to reach 146 units rather than the promoter, Equity Group, Inc. as stated in the PPM. *See* Robins, *All-or-None Offerings*, 19 Sec. & Commodities Reg., at 59 (March 19, 1986). These were "designed to create the appearance of a successful offering in order to avoid the refund feature of the offering." *Borman v. Applied Vision Systems, Inc.*, 800 F.Supp. 800 (D. Minn. 1992).

> The SEC rationale underlying Rule 10b-9 is known as the Corroboration Theory: With an offering of shares in a new company, one of the investors' major concerns will be whether the price they are paying for the securities is a fair market price. The inability of the underwriter to sell the specified minimum to bona fide investors may well indicate that the market judges the offering price to be too high. Thus, to declare an offering completed through non-bona fide sales..., where the purported investors have not made an investment decision backed with their own money, may significantly mislead the legitimate investors as to a crucial factor in their decision.

A. J. White & Co. v. SEC, 556 F.2d 619 (1st Cir. 1977), *cert. denied*, 434 U.S. 969, 98 S. Ct. 516, 54 L.Ed. 2d 457 (1977). *See* Loss, *supra*, Vol. VIII at pages 3892-3896, Vol. I

at pages 342, and Vol. II at pages 680-81 and note 184; and Bloomenthal, *Going Public and the Public Corporation* (1991 Revision), Vol. 1A, § 8.03[4] at pages 8-63-8-72 (suggesting and explaining the proper procedures and drafting language); *Securities and Exchange Commission v. Coven*, 581 F.2d 1020, 1028-29 (2d Cir. 1978) (attorney aided and abetted a violation of Rule 10b-9 by permitting underwriters to draw from the "all-or-none" portion of the proceeds without first assuring that the requisite number of shares had been sold.)

In *C. Brock Lippit*, 48 S.E.C. 524, 528 (1986), the SEC found it "well established that undisclosed purchases by underwriters or their affiliates, arranged for the purpose of closing an unsuccessful 'all-or-none' . . . offering, are fraudulent." In affirming in *Svalberg v. S.E.C.*, 876 F.2d 181, 183 (D.C. Cir. 1989), the court stated:

> The all-or-nothing provision serves not only to ensure that the issuing firm has sufficient funds to complete its project, but also to give investors some reasonable indication that they are paying a fair market price for their investment. Closing an all-or-none offering before the required number of

> shares has been sold *to the public* is therefore fraudulent.

The purchase by an affiliate to close out an offering is not bona fide because it created "a false impression that the required minimum number of shares had been sold to the public." [*Id.*, at 183.] Defendants' "failure to inform investors that stock could be purchased by persons associated with the underwriter is 'material' to the charges against them." [*Id.*, at 183-184]. The Commission's opinion, 48 S.E.C. at 526, states:

> It is well established that undisclosed purchases by underwriters or their affiliates, arranged for the purpose of closing an unsuccessful "all-or-none" or "part-or-none" offering, are fraudulent. The all-or-none" or "part-or-none" contingencies have been called the "principal protection" of investors. They guarantee each investor that his money will be refunded unless other public investors share his view that the risk he is taking is worthwhile, and that the price he is paying is fair.

The formation and special financing of the EC partnerships "created the facade of a successful offering, vitiating the conditions upon which investors had relied." 48 S.E.C. at 601. *See Rooney, Pace, Inc.*, 48 S.E.C. 602, 604, 607 (1986) (respondents "merely created the appearance

of a successful offering because several of their sales did not qualify as bona fide.")

B. Violations of Rule 10b-9 Constitute Violations of Rule 10b-5

"Conduct that violated (or would violate) Rule 10b-9 . . . has been held to violate also Rule 10b-5." Loss, *supra*, Vol. VIII at p. 3896 and cases cited at n. 272; *Securities & Exchange Commission v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1095, n. 13a (2d Cir. 1972); *C.E. Carlson, Inc. v. S.E.C.*, 859 F.2d 1429, 1434 (10th Cir. 1988); *Securities & Exchange Commission v. Commonwealth Chemical Securities*, 574 F.2d 90, 97 (2d Cir. 1978) (non-bona fide purchases in "all-or-none" offering constituted violations of Rule 10b-5.) (conceded by the court of appeal, A63-64, n. 56.)

Representations such as those made in this case are always considered material. *FAI Investments Analysts, Inc.*, 46 S.E.C. 1134, 1136, n. 11 (1977):

> [11]Respondents argue that their "misrepresentations . . . with respect to the return of funds by a specified date "were not material for Rule 10b-9 purposes. But that Rule, unlike Rule 10b-5 under the Securities Exchange Act, prohibits a specific type of misrepresentation. And we

> adopted it because we considered the misrepresentations it bans always material. Hence it is not necessary to show materiality to establish a violation in the specific case.

Understandably concerned with the enormous liability attendant to rescission after issuance of the bond, Home/Graham "stepped our of their [surety] roles and actively promoted the securities." *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1125 at no. 21 (5th Cir. 1988), *vacated on other grounds sub nom. Fryar v. Abell*, 492 U.S. 914 (1989). They are directly liable for the violations of Rule 10b-5 and Rule 10b-9.

C. History of the Rule 10b-9 Allegations

Beginning with their original complaint and throughout the entire case, petitioners made factual allegations of the failure of the "part or nothing" sale.[3]

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[3] In their original complaint, R. 300, plaintiffs made factual allegations of the failure of the "part or nothing" sale at ¶ 34, R. 313 and attached a copy of the Duane Memorandum, ¶ 6, pages 5-6, of which is quoted at pages 7-8, *supra*. *See also* Plaintiffs' Third Supplemental and Amended Complaint, R.

The district court's factual summary, A70, acknowledges the right of rescission and the formation of the EC partnerships, which the constitute substantial factual ba-

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1821 at ¶ 34, R. 1836, Dkt. 137; Plaintiffs' Memorandum in Opposition to Motion of Defendants The Home Insurance Company, Peat Marwick Main & Co, The Graham Company and Sessions, Fishman for Partial Summary Judgment, R. 12013 at R. 12018, 12023-25, Dkt. 651; Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment Filed by Hibernia National Bank, R. 13208-10, Dkt. 671 at pages 1-3; Plaintiffs' Consolidated Opposition to Partial Motion for Summary Judgment Filed by Defendants The Home Insurance Company and The Graham Company and to Joint Motion of Defendants The Graham Company, The Home Insurance Company and Sessions for Partial Summary Judgment, R. 14383, Dkt. 691 at pages 7, 18, 13, 16-17, R. 14389-40, 14395, 14398-99; Memorandum in Opposition to Home and Graham's Motion for Reconsideration of Motion for Summary Judgment, R. 15451 at page 3, R. 15453, Dkt. 742.

sis for the 10b-9 claims.[4] There was therefore no discretion to avoid consideration of undeniable violations of the securities laws occasioned by the failure of the bona fide sale of the minimum number of units, the improper use of investor funds prior to that time, and the sale of the units on different terms and to investors associated with the Equity Group, all of which, *inter alia*, constituted violations of Rule 10b-9 as well as of Rule 10b-5.

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[4] During the latter part of 1984, forty of the Courtside units remained unsold. The offering period was scheduled to end on January 24, 1985. Any extension of the offering period would have triggered a right of rescission for the existing limited partners of Courtside. Four Louisiana general partnerships (E-C One, E-C Two, E-C Three and E-C Four) were formed to purchase the unsold units. Hibernia loaned the funds to each E-C partnership, requiring the Equity principals to become E-C partners and required each non-Equity partner in the E-C partnerships to execute a solidary continuing guarantee of the entire Hibernia loan.

II. IMPROPER STANDARD OF REVIEW

A. What Happened in the District Court

The district court obviously concluded that the new arguments had merit:

> THE COURT: Some genius lawyer comes in with this new theory and then everybody's hanging onto his coat tails because they don't like the decision the Court made two years ago or whatever it was. (April 1, 1992 Hearing Transcript, p. 27)

Initially, the district court properly requested more extensive briefs on the issue:

> THE COURT: Oh, yes, I want argument on this, because Mr. Hobson is going to take this up to the Fifth Circuit if I rule in your favor, which I may, and he's saying that it's not new, he's saying that it's old.
>
> Well, I want him to show me in a more extensive brief where this issue had always been here for years and the Court just never addressed it or that it was never addressed before this time. I'll give him that opportunity, but let me just say this, that was filed as a supplemental memorandum. . . . (April 1, 1992 Hearing Transcript, p. 20)

Then, after counsel for Home and Graham cited *Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir. 1992), *cert. denied*, ___ U.S. ____, 113 S.Ct. 82, 121 L.Ed.2d 461 (1992), the

district court decided to accept no brief; to hear no argument; to consider no material from the record:

> THE COURT: I am going to deny these motions. Take it to the Fifth Circuit. Let the Fifth Circuit tell me, look, Wicker, you're way wrong, Mr. Hobson is right, you have an obligation, you have an absolute obligation to let him now introduce his theories on 10b-9 after, what, six years? Six years. If they do that, of course, I will, but right now, I'm going to deny it. (April 1, 1992 Hearing Transcript, p. 23)

On June 3, the district court declined to permit a supplementation of the summary judgment record with relevant document all of which was already in the extensive district court record:

> THE COURT: How about this Topalian case, which is a Fifth Circuit case, which specifically states here expressly that --they're talking about the Fifth Circuit -- this Court's inquiry is limited to the summary judgment record before the trial court. The parties cannot add exhibits, depositions or affidavits to support their positions on appeal, nor may the parties advance new theories or raise new issues to secure reversal. (June 3, 1992 Hearing Transcript, p. 5)
>
> THE COURT: I'm going to deny your motion and if the Fifth Circuit feels that those documents belong in there, they can either let you file it into the record in the Fifth Circuit or reverse me and sent it

back and say, "Judge Wicker, those papers should be in this record." I'm going to let them make that decision. . (June 3, 1992 Hearing Transcript, p. 8)

B. New Issues on Appeal

In *Roofing & Sheet Metal Servs., Inc. v. LaQuinta Motor Inns., Inc.*, 689 F.2d 982, 989-990 (11th Cir. 1982), Judge Wisdom of the Fifth Circuit, sitting by designation, applied the law of this Court to consider a theory not presented to the district court and, by so doing, reversed an improvidently granted summary judgment.

> LaQuinta argues that we should not consider Roofing's choice of law theory, because Roofing did not present that theory to the district court. "As a general principle of appellate review, we will not consider at a legal issue or theory that was not presented to the trial court." [citation omitted.] The decision whether to consider an argument first made on appeal, however, is "left primarily to the discretion of the courts of appeals. to he exercised on the facts of individual cases." *Singleton v. Wulff*, 1976, 428 U.S. 106. 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826, 837. In the exercise of that discretion, we may pass on issues not raised below if "the ends of justice will best be served by doing so." ." [citation omitted.] Specifically. we will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice. ." [citation omitted.] Roofing has raised

> no new factual questions, and as our discussion below will establish, the record, viewed in the light appropriate on appeal from summary judgment, supports its legal argument. A refusal to consider that argument could result in a miscarriage of justice.

According to Judge Wisdom, 689 F.2d at 190, "Any wrong result resting on the erroneous application of legal principles is a miscarriage of justice in some degree." He found the additional factors, here present, that the appellant's theory was "not strictly a new legal issue or an 'afterthought'" and that appellant was there "asserting not a new theory of recovery but a rebuttal to LaQuinta's defense . . ." Moreover,

> When the plaintiff, in apparent good faith, has pursued the same theory of recovery throughout, when an erroneous summary judgment resulted from the plaintiff's failure to point out the legal insufficiency of the affidavits supporting a defensive theory, . . . , we consider it unwise, in the exercise of our discretion, to ignore the plaintiff's valid rebuttal on appeal. Rather. we must be mindful of our "duty to apply the correct law".
>
> Consideration of legal arguments not raised in the district court is especially appropriate on appeal from summary judgment. The rule against consideration of new issues derives primarily from "the needs of judicial economy and

the desirability of having all parties present their claims in the court of first instance". *Id.* (*citing Hormel v. Helvering*, 1941, 312 U.S. 552, 556-60, 61 S.Ct. 119, 721-23, 85 L.Ed. 1037, 1040-1043) It also reflects a concern for avoiding prejudice to the parties. *Bliss v. Equitable Life Assurance Society*, 5 Cir. 1980, 620 F.2d 65, 70. ***Remand after reversal of summary judgment does not seriously impair judicial economy, because, unlike remand after a full trial, it does not involve the district court in redundant proceedings. The party prevailing on appeal must still present its arguments, with the necessary evidentiary support, to the trial court if it is ultimately to prevail. And the burden on the party that initially won summary judgment is not comparable to that involved in remand after the time and expense involved in a full trial.*** Accordingly, cases in which the Former Fifth Circuit has declined to consider arguments raised for the first time on appeal have generally not involved appeals from summary judgment. [citations omitted, emphasis added]

C. The Fifth Circuit

Judge Wisdom's view was formerly the prevailing one in the Fifth Circuit. In *Xerox Corporation v. Genmoora Corp.*, 888 F.2d 345, 348 (5th Cir. 1989), he stated:

> Although much of the evidence was not before the district court at the time it entered its February

> 10 dismissal and summary judgment, the case was not yet over. The trial court was obliged to consider Xerox' motion for reconsideration of the order of February 10 and Xerox' request for leave to amend its complaint.

Although "Refusal to grant reconsideration is tested under an abuse of discretion standard, . . . the Judge has to consider judicially the record at the time of the motion for reconsideration not just as it existed at the time of the initial ruling." *Xerox*, 888 F.2d at 349. The material submitted to the district court with the Motion for Reconsideration, like the documents submitted by *Xerox*, "reflect the existence of genuine issues of material fact." Accordingly, the trial judge "knew positively at the time that his earlier grant of summary judgment could no longer be justified." He could not "turn his back on such an overwhelming showing."

> He was obliged to reconsider and rescind the interlocutory summary judgment order. Failure to do so constituted an abuse of discretion.

Xerox, 888 F.2d at 356. *Compare, Fayetteville Investors v. Commercial Builders*, 936 F.2d 1462, 1469-70, 1472-73 (4th Cir. 1991); *Whittaker Corp. v. Executair Corp.*, 953 F.2d 510,

515 (9th Cir. 1992) (motion for reconsideration), *Glass v. Dachel*, 2 F.3d 733, 739-740 (7th Cir. 1993) (district court had obligation to review material in the record raised by the appellants); *Floyd v. Laws*, 929 F.2d 1390, 1400-1401 (9th Cir. 1991):

> As a general rule of federal practice, any question which has been presented to a federal district court for a ruling and which has not thereafter been waived or withdrawn is presented for review.

Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915-917 and 917-922 (5th Cir. 1992) manifests the erosion in Judge Wisdom's position and the emergence of more draconian exclusionary rules.

In *Skotak*, the plaintiffs, non-moving parties, failed, until the reply brief on appeal, to point to critical scientific articles that were in the record and which may have resulted in denial of summary judgment. Judge Barksdale, the author of the instant decision, concluded that the trial court was not required to search the record, so that the failure to locate these articles, albeit in the record, could not be error on appeal. Judge Wisdom did

not wish to so limit the record and would have considered any documents, including the articles, in determining whether or not the nonmoving party had borne its burden of showing triable issues of fact.

Both majority and dissent assume, however, that had the nonmoving parties brought these articles to the attention of the district court or had the trial court "found" them [*id.* at 915, n. 6], the trial court would have appropriately considered them and erred in granting or (by implication) not reconsidering summary judgment.

In the present case, Judge Barksdale cited *Topalian v. Ehrman,* 954 F.2d at 1131-32, n. 10 to find harmless the refusal of the district court to permit supplementation of the record "because our review is limited to the record before the district court when it ruled." 2 F.3d at 629, n. 57, A65. *Topalian,* however, does not support an extension of a prohibition of new evidence on appeal to a foreclosure of new evidence or legal theories in the district court on reconsideration and certainly does not excuse a refusal to exercise discretion in a proper case.

Even if the 10b-9 theory had never previously been advanced to the district court, this did not end the inquiry in the district court. The standard of review of the court of appeal could not evade by the conclusory statement at 2 F.3d at 629, A63, that:

> As is apparent from Turnbull's post-judgment efforts and brief on appeal, appellants' theory requires the assertion of legal issues not previously raised; the introduction of additional evidence; and the analysis of a different law. [footnotes omitted.]

Neither the text nor the footnotes lend any factual support whatever to this statement.

Hormel v. Helvering., 313 U.S. 552, 557, 61 S.Ct. 719, 721 (1941) is directly contrary:

> Rules of practice and procedure are designed to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

D. The Law of this Court and Other Circuits

Factors present in this case and utilized by this Court and other courts of appeal to permit consideration of a dispositive legal theory on appeal are:

1. "[W]here 'injustice might otherwise result . . . [because] the proper resolution is beyond any doubt . . ." *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); *Nealon v. Stone*, 958 F.2d 584, 592, n. 6 (4th Cir. 1992); *Brown v. Crowe*, 963 F.2d 895, 897-98 (6th Cir. 1992); *Meade v. Pension Appeals and Review Committee*, 966 F.2d 190, 194 (6th Cir. 1992); *Sammons v. Taylor*, 967 F.2d 1533, 1544 (11th Cir. 1992) (simple fairness).

2. "[T]he issue is purely one of law and the pertinent record has been fully developed." *In re Howell*, 731 F.2d 624, 626-27 (9th Cir. 1984), *cert. denied*, 469 U.S. 933, 105 S.Ct. 330 (1985); *United States v. Bess*, 357 U.S. 51, 54-55, 78 S.Ct. 1054, 1057 (1958) (fact in the record); *Ackerman v. Western Elec. Co., Inc.*, 860 F.2d 1514, 1517 (9th Cir. 1988); *U.S. v. Bigman*, 906 F.2d 392, 395 (9th Cir. 1990) (record fully developed prior to appeal); *Winebrenner v. U.S.*, 924 F.2d 851, 856 n. 7 (9th Cir. 1991); *New Hampshire*

Ins. Co. v. Viera, 930 F.2d 696, 702 (9th Cir. 1991) (appellate consideration of an issue that is "purely one of law and either does not affect or rely upon the factual record developed by the parties."); *Schoenberg v. Exportadora de Da. S.A. de C.V.*, 930 F.2d 777, 782-83 (9th Cir. 1991) (the issue was implicitly raised in the district court by the appellee); *Wayne County Neighborhood Legal Serv. v. National Union*, 971 F.2d 1, 3 and n. 2 (6th Cir. 1992) (no waiver); *Austin v. McNamara*, 979 F.2d 728, 733 and n. 3 (9th Cir. 1992) (affirmative defense); *U.S. v. Mercedes-Amparo*, 980 F.2d 17, 19 (1st Cir. 1992); *Botefur v. City of Eagle Point, Or.*, 7 F.3d 152, 155 (9th Cir. 1993) (purely legal issue).

3. "[T]he issue presents only a question of law, . . . requiring no new or amplified factual determination." *Taft Broadcasting v. U.S.*, 929 F.2d 240, 244 (6th Cir. 1991); *Roosevelt v. E. I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419, n. 5 (D.C. Cir. 1992); *Colorado Interstate v. CIT Group/Equipment Fin.*, 993 F.2d 743, 751 (10th Cir. 1993)

(addressed by the district court in dicta and fully briefed on appeal).

4. The parties had a full opportunity to brief and argue the issue on appeal. *United States v. Bess*, 357 U.S. at 54-55, 78 S.Ct. at 1057; *U.S. v. Pickett*, 941 F.2d 411, 415 (6th Cir. 1991) (extensive briefing and issues wholly legal, thus no advantage to remand); *Katt v. Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992).

5. Where the issue was raised, at least implicitly, in the district court. *Roofing*, 689 F.2d at 990; *Higgins v. New York Stock Exchange, Inc.*, 942 F.2d 829, 832 (2d Cir. 1991) ("This argument, although different in emphasis from the point pressed on appeal, at least introduced the notion of a legal obstacle to filing suit."); *Universal Title Ins. Co. v. U.S.*, 942 F.2d 1311, 1314 (8th Cir. 1991) (argument before the district court "was broad enough to encompass all of its arguments on appeal."); *Edmond v. United States Postal Service General Counsel*, 949 F.2d 415, 420-22 (D.C. Cir. 1992) (contained in the complaint, presentation was often confused, and issue not considered by the dis-

trict court, but was surely an obvious reading of the case); *Budden v. U.S.*, 963 F.2d 188, 192 (8th Cir. 1992) (sufficiently made an issue in the trial); *Olin Corp. v. Insurance Co. of North America*, 966 F.2d 718, 722-23 (2d Cir. 1992) (new spin on claim admittedly made); *International Union v. Murata Erie North America*, 980 F.2d 889, 898 and n. 6 (3d Cir. 1992); *Donohoe v. Consolidated Operating & Prod. Corp.*, 982 F.2d 1130, 1138 (7th Cir. 1992) (issue of control person in securities claim raised in the complaint and, although not addressed thoroughly in opposition to motion for summary judgment, the moving party did not devote much time to it either).

6. "Arguments made on appeal need not be identical to those made below if they involve only questions of law and additional findings of facts are not required." *A.I. Trade Finance, Inc. v. Petra Bank*, 989 F.2d 76, 80 (2d Cir. 1993) (issues fully briefed).

7. Where summary judgment was granted below so that the moving party will not be prejudiced by consideration of a new legal theory. *Roofing*, 689 F.2d at 991;

Fane v. Edenfield, 945 F.2d 1514, 1519, n. 11 (11th Cir. 1991), *aff'd on other grounds*, ___ U.S. ___, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) ("Consideration of legal arguments not presented to the district court is especially appropriate on appeal from summary judgment."); *Seniority Research Group v. Chrysler Motor Corp.*, 976 F.2d 1185, 1187-88 (8th Cir. 1992) (inconsistent with substantial justice not to consider new argument).

CONCLUSION

Both the district court and the court of appeal implicitly found the 10b-9 legal theory dispositive. Upon the undisputed facts found by the district court and by the court of appeal, the actions of Home/Graham were clearly violations of Rule 10b-9. All parties had full opportunity to brief the issues in the district court and the court of appeal.

Under such circumstances and in the absence of a contrary factual conclusion based on review of and citation to the record, neither the district court nor the court of appeal had discretion to avoid consideration of

the violations of the securities laws occasioned by the failure of the bona fide sale of the minimum number of units, the improper use of investor funds prior to that time, and the sale of the units on different terms and to investors associated with the Equity Group, all of which constituted violations of Rule 10b-9 as well as of Rule 10b-5.

Once the district court was put on notice of the legal consequences under Rule 10b-9 of the undisputed, affirmative actions by Home/Graham in connection with formation of partnerships and sale of units that resulted in the wrongful deprivation of plaintiffs' rights of rescission, it could not simply ignore such strong evidence of direct violations of the securities laws, controlling, and aiding and abetting by Home/Graham. Summary judgment was therefore inappropriately granted in this case. Certiorari should be granted. The decisions should be below vacated and reversed.

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By: _____

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CERTIFICATE

I hereby certify that a copy of the foregoing pleading has been served upon all interested counsel, by FAX, by hand or by placing copy of same First Class mail, and properly addressed, on January 10, 1994.

_____

Louis R. Koerner, Jr.

APPENDIX

CONTENTS TO APPENDIX

1. *Abbott v. Equity Group, Inc.* (Fifth Circuit, 92-3376, September 28, 1993) (Opinion reported at 2 F.3d 615) A4-67.

2. *Abbott v. Equity Group, Inc.*, C.A. No. 86-4186 (United States District Court, Eastern District of Louisiana, January 6, 1990) (Written Reasons). A68-101.

3. *Abbott v. Equity Group, Inc.*, C.A. No. 86-4186 (United States District Court, Eastern District of Louisiana, March 13, 1991) (Amendment to Written Reasons). A102-105.

4. *Abbott v. Equity Group, Inc.*, C.A. No. 86-4186 (United States District Court, Eastern District of Louisiana, January 30, 1992) (Final Judgment) A106-114.

5. *Abbott v. Equity Group, Inc.*, C.A. No. 86-4186 (United States District Court, Eastern District of Louisiana, March 11, 1992) (Minute Entry denying motion for new trial) A115.

6. *Abbott v. Equity Group, Inc.*, C.A. No. 86-4186 (United States District Court, Eastern District of Louisi-

ana, December 9, 1991)) (Minute Entry denying motion to supplement the record) A116.

7. *Abbott v. Equity Group, Inc.* (Fifth Circuit, 92-3376,) (Fifth Cir. November 12, 1993) (Rehearing denied, __ F.3d ___). A-117-118.

United States Court of Appeals,
Fifth Circuit.
No. 92-3376.

Walter R. ABBOTT, M.D., et al., Plaintiffs-Appellants,

and

Mrs. E. Elizabeth Turnbull and, Louis R. Koerner,
Plaintiffs-Appellants,

v.

The EQUITY GROUP, INC., et al., Defendants,

The Home Insurance Company and, the Graham Company,
Defendants-Appellees

In re Ronald C. ELLINGTON, et al., Debtors.

Mrs. E. Elizabeth Turnbull and, Louis R. Koerner,
Claimants-Appellants.

Sept. 28, 1993.

Appeals from the United States District Court for the

Eastern District of Louisiana.

Before REAVLEY, DUHÉ, and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

This appeal from a summary judgment turns for the most part on the reach of the federal securities laws for entities that are not the primary parties for securities violations, and on the relief *vel non* to be accorded parties who, subsequent to entry of judgment, raise a new theory of liability. Investors in Courtside Ltd., a Louisiana partnership formed to acquire and operate an apartment community in Houston, Texas, brought suit against, *inter alia,* The Home Insurance Company and The Graham Company. As to them, they alleged that Home and Graham's continued participation as surety and bonding agent respectively for the Courtside transaction, despite their knowledge of misrepresentations and material omissions in the Private Placement Memorandum, violated, *inter alia,* federal securities laws and rendered the investors' indemnity agreements with Home unenforceable. The district court granted summary judgment in favor of Home and Graham and refused, post-judgment, to allow a new theory of liability to be raised. We AFFIRM.

I.

In 1984, the Equity Group, Inc., formed Courtside, becoming the managing general partner.[1] Limited partners were required to execute a subscription agreement, which, *inter alia,* emphasized that the investment involved "a high degree of risk and special risks". The purchase price per unit investment was a combination of cash ($1,500)[2] and credit, consisting of two promissory notes for approximately $38,000 (first note) and $7,000 (second note).

To obtain financing from Hibernia National Bank and Security Savings and Loan Association, Courtside pledged the limited partners' first notes to Hibernia as collateral; the second, to Security. As additional security,

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[1] The Equity Group, Michael B. Smuck, Mark H. Strauss, Joseph T. Michelli, and Ronald C. Ellington were named as general partners.

[2] After November 21, 1984, the cash portion of the purchase price decreased to $2,500 for two units.

in late December 1984, Home, through its agent, Graham,[3] issued a financial guarantee bond in favor of each bank as permitted assignee, with the Courtside investors as principals, and the partnership (Courtside) as obligee. The bonds obligated Home to pay Hibernia up to $3,941,025 and Security up to $1,050,000.

Home received a premium of $257,060 for its issuance of the bonds (total obligation of almost $5 million). In addition, Home required each investor to execute a pledge of partnership interest to Home, and sign an indemnity agreement protecting Home against, *inter alia,* all losses in connection with the bonds.

Graham, as agent for Home, required that each investor execute a limited partner's application for financial guarantee bond, and thus reviewed their creditworthiness. Home reserved the right to approve the lan-

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[3] Graham is a property and casualty broker. In September 1983, Home entered into a general agency agreement with it for the issuance of limited partnership financial guarantee bonds.

guage in any financial guarantee bond as well as in the general partner indemnification agreement, the limited partner indemnification and security agreement, and the remarketing agreement.

It is undisputed that neither Home nor Graham had direct communication with limited partners or their advisors prior to their investment in the partnership; rather, Equity solicited the limited partners primarily through the Private Placement Memorandum (PPM) (twice supplemented), and oral presentations. Alleged misrepresentations and material omissions in Equity's solicitation initiatives form the basis of this action. As for Home and Graham's involvement, the investors primarily rely on a legal memorandum prepared for Graham by the Duane, Morris & Heckscher (Duane Morris) law firm.

In the course of analyzing the transaction for Home, Philip Glick, vice president of Graham, sent a copy of Equity's PPM to Duane Morris for review, specifically requesting Donald Auten, a lawyer in the tax

section,[4] to "review the contents of this Memorandum and provide us with your comments on the structure and adequacy of disclosure, the reasonableness of the tax position taken and the adequacy of the tax opinion relative to the tax discussion". Glick also welcomed "any other observations you [Auten] may have relative to the tax structure and legal disclosure in relation to other projects you may have seen".

Auten prepared a 15 page memorandum (Duane Memo); he stated in his deposition that he was singularly responsible for its contents, and that he based his analysis solely on his review of the PPM.[5] The Duane Memo began by stating that "[o]ur overall reaction to the ade-

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[4] Auten testified that he did not "pretend to be a "securities lawyer' "; but he was "familiar in a general way with Rule 10(b)(5)".

[5] According to Auten, his engagement "was simply to take this red book [the PPM] and read it from one end to the other".

quacy of the disclosure in the PPM from a securities standpoint is that the PPM would appear deficient in several material respects and should be supplemented". Among the items mentioned were (1) the absence of discussion and analysis relating to the prior history of the project;[6] (2) troublesome tax issues arising from an appraisal showing a fair market value ($12,700,000) in excess of the arm's length purchase price ($10,249,250); (3) inconsistent calculations of expected proceeds upon sale of the project in 1992 or 1994; (4) the risks to the investors and to Home of a procedure allowing the partnership to hold an interim closing, providing that Equity purchase any remaining Units (up to 146) on the final

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[6] The Duane Memo opined that this was "[p]erhaps the most serious omission in the PPM from a securities standpoint" and recommended that "[a]t a minimum, the adverse prior history should be discussed and analyzed in the text of the PPM".

closing date;[7] (5) the failure to explicitly disclose the true effective interest rate (17%) with respect to the new

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[7] The Duane Memo stated that "[t]his procedure creates a serious risk to the investors as well as to the Surety". It explained:

> Because the offering may close and the Project may be purchased with far fewer than 146 Units having been sold, if the Managing General Partner were to become financially embarrassed between October 1, 1984, and January 24, 1985 [final closing], the investors and Surety could be left in an unacceptable position.

Thus, it recommended a change in procedure:

> [I]f closing on the project takes place before the minimum of 146 Units are sold, the Managing General Partner is required to put funds in escrow (or furnish an irrevocable letter of credit) to guarantee that on January 24, 1985, the Managing General Partner will be able to satisfy its obligation to purchase the remaining Units.

It added that "[t]he existing procedure completely undermines that concept of requiring a minimum number of Units to be sold before closing can take place".

money under the wraparound mortgage;[8] and (6) the need to include an exculpatory statement in the PPM precluding the investors' reliance on Home in making their investment decisions.

In September 1984, Glick (Graham) wrote a letter to Equity regarding changes to the PPM. He included several suggestions set forth in the Duane Memo, including the need to insert disclaimer language in the PPM and surety related documents. Shortly thereafter, Glick wrote a follow-up letter to Equity and attached a copy of the Duane Memo, noting that "this Memorandum highlights some additional technical corrections which we feel should be made in the Equity Group Offering Memorandum from a specific tax and securities disclo-

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[8] The Memo opined: "If an investor were told this fact (instead of having to make the calculations for himself), his view of the economic risks of the investment might change. Once again, however, this potentially unfavorable information is effectively buried in the PPM".

sure standpoint". Glick requested Equity's "cooperation with us in including these changes in the supplement", and related that,

> [f]rom past experience we have found that obtaining another viewpoint on our clients' Memorandums has often resulted in some worthwhile improvement, both from a legal and marketing standpoint. I hope these comments will be helpful to you and that they will provide additional comfort to the Home Insurance Company in conjunction with the issuance of its bond.

The first supplement to the PPM was released on November 21, 1984. It incorporated disclaimer language providing that Home and Graham "have not made any investigation ... as to the merits ... and make no representation nor express any opinion with respect thereto, ...", along with an explicit acknowledgement that investment decisions were made without reliance on the surety (Home) or its agent (Graham). In addition, the supplement emphasized the investors' unconditional obligation to Home under the indemnity agreement. It did not,

however, incorporate a number of the other changes suggested in the Duane Memo.

During the latter part of 1984, 40 of the Courtside units remained unsold, with the offering period scheduled to end on January 24, 1985. Four Louisiana general partnerships (E-C One, E-C Two, E-C Three and E-C Four) were formed to purchase the unsold units. Hibernia loaned the funds to each E-C partnership, requiring the Equity principals to become E-C partners and requiring each non-Equity partner in the E-C partnerships to execute a solidary continuing guarantee of the entire Hibernia loan. Home agreed to act as surety for the Hibernia loan. The formation of the E-C partnerships was disclosed in the second supplement to the PPM, issued on January 18, 1985.[9]

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[9] The second supplement provided in part:

> Under the terms of the Memorandum, the Managing General Partner must purchase on January 24, 1985 all unsold Units up to the minimum offering amount (146 Units). In order to purchase such Units, it is anticipated that Affiliates of the Manag-

Subsequent to the expiration of the offering on January 24, 1985, Courtside experienced financial problems and ultimately declared bankruptcy. Because Courtside failed to meet its financial obligations, the banks called the investors' notes. The investors (limited partners) defaulted, thus obligating Home to make payments under the terms of each bond. Home, in turn, looked to the investors for a full accounting, pursuant to the indemnity agreements.

In September 1986, over 40 Courtside investors brought suit against, *inter alia*, Equity, Home, and Graham. The complaint was amended several times, result-

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ing General Partner will form four general partnerships to purchase the unsold Units which are anticipated to aggregate 40. These general partnerships will be formed specifically to purchase 10 Units each in the Partnership. It is anticipated that Hibernia will lend to each of the general partnerships sufficient funds to enable the general partnerships to pay the cash portion of the purchase price of the Units plus the first three year installments under the First and Second Installment Notes. Thereafter, the general partnership will be required to pay the installments due on the First and Second Installment Notes.

ing in a third supplemental and amended complaint filed in March 1987. The investors made claims under, *inter alia,* violations of §§ 12(2) and 15 of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1933 Act); §§ 20(a) and 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1934 Act), along with Rule 10b-5; the Louisiana Blue Sky Law, La.Rev.Stat.Ann. § 51:701 *et seq.;* and state law (Louisiana) for fraud and negligent misrepresentation. They sought damages and rescission. Home counterclaimed for enforcement of the indemnity agreements.[10]

As noted earlier, the suits were based on the contention that Equity induced plaintiffs' investments through misrepresentations and omissions in the PPM, and misleading oral presentations. Specifically, they maintained that Equity, *inter alia,* misrepresented its fi-

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[10] Separate actions by two other groups of investors, along with a separate action by Home, were consolidated with the original action.

nancial health; the condition, location, occupancy, tenancy and fair market value of the property; and the soundness of the investment (*i.e.* "virtually risk free").

After over four years of discovery and pre-trial motions, Equity, as well as other defendants, announced settlement. (All defendants ultimately settled, except for the Gerald Teel Company, Hibernia, Home, and Graham.) That day, the court granted judgment on Home and Graham's motion to reconsider its earlier denial of summary judgment on the remaining issues,[11] thereby disposing of plaintiffs' case and granting Home's claims for enforcement of the indemnity agreements. The court issued written reasons approximately four months later (January 1990).

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11 The motion sought reconsideration of the denial of judgment as to the state law negligence claim, as well as to resolve legal issues regarding the enforceability of the indemnity agreements. The court had previously granted judgment for Home and Graham on the remainder of plaintiffs' claims.

Over the next two years, the parties disputed issues of costs, interest, attorney's fees, and amounts due Home. Therefore, final judgment was not entered until January 1992. Ten days later, plaintiffs moved for a new trial. Upon denying plaintiffs' motions to file a supplemental memorandum raising a new theory of liability, and for reconsideration of same, the court denied plaintiffs' motion for a new trial. Since then, all but five of the plaintiffs have settled.[12]

II.

Appellants challenge the district court's disposition of the summary judgment motions, and also assert error based on the court's post-judgment rulings.

A. Summary Judgment

We review a summary judgment *de novo. E.g., Degan v. Ford Motor Co.*, 869 F.2d 889, 892 (5th Cir.1989). It

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[12] The appellants are: (1) D.L. Bradke; (2) Eugene M. Parrish; (3) David Sibley; (4) Louis R. Koerner; and (5) Elizabeth Turnbull.

may be granted if there is "no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law". Fed.R.Civ.P. 56(c). "[T]he substantive law will identify which facts are material". *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The movant has the initial burden of demonstrating the absence of material fact issues. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.1992), *cert. denied*, --- U.S. ----, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). To avoid summary judgment, the nonmovant must adduce evidence which creates a material fact issue concerning each of the essential elements of its case for which it will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). "[A] dispute about a material fact is "genuine' ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party". *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. We resolve all factual inferences in favor of the nonmovant. *Degan*, 869 F.2d at 892.

Needless to say, unsubstantiated assertions are not competent summary judgment evidence. *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553.

1. Controlling Person

Sections 15 of the 1933 Act[13] and 20 of the 1934 Act[14] impose liability on "controlling persons" for secu-

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[13] Under the 1933 Act:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections [11 or 12], shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable....
>
> 15 U.S.C. § 77o.

[14] The 1934 Act states:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable....

rities violations committed by those under their control. Appellants maintain that material fact issues remain concerning Home and Graham's liability as "controlling persons". As discussed *infra*, we have no ruling by the district court of an underlying securities violation and thus assume a violation for purposes of our analysis.

The parties disagree on the elements for a *prima facie* case under §§ 15 and 20.[15] Specifically, appellants take issue with Home and Graham's assertion, based on

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15 U.S.C. § 78*t* (a).

[15] The control person sections of both acts are interpreted the same, at least with respect to the definition of "controlling person", *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 958 & n. 22 (5th Cir.1981).

> The term "control' ... means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

17 C.F.R. § 230.405(f) (quoted in *Id.* at 957-58).

G.A. Thompson & Co., Inc. v. Partridge, 636 F.2d 945 (5th Cir.1981), and *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 949 (7th Cir.1989), that this circuit has adopted the two part test of *Metge v. Baehler*, 762 F.2d 621 (8th Cir.1985), *cert. denied, Metge v. Bankers Trust Co.*, 474 U.S. 1057, 106 S.Ct. 798, 88 L.Ed.2d 774 (1986).

In *Thompson*, our court held that an officer and director, who owned 247 of the company, and was apparently involved in the day-to-day coordination of loan gathering,[16] had the "requisite power to directly or indirectly control or influence corporate policy", and, thus, was a controlling party. 636 F.2d at 958. In so doing, our court rejected the contention that actual participation in the transaction underlying the violation was a prerequisite for a *prima facie* case, noting that "[l]ack of participation and good faith constitute an affirmative defense". *Id.* At the same time, it noted that our precedent was "ambiguous on whether "effective day-to-day control' is

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16 The corporation marketed mortgage loans. *Id.* at 949.

required", and, without deciding the issue, noted that the evidence established sufficient day-to-day control. *Id.* at 958 n. 24.

In *Metge,* the Eighth Circuit subsequently established a two-prong test for a *prima facie* case for controlling person liability: (1) "that the defendant [ ] actually participated in (*i.e. exercised* control over) the operations of the corporation in general"; and (2) "that the defendant possessed the power to control the specific transaction or activity upon which the primary violation is predicated, but [plaintiff] need not prove that this later power was exercised". 762 F.2d at 631 (internal quotations omitted) (emphasis in original).[17] The court cited

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[17] The court found that evidence of, *inter alia,* a lender's 187 ownership of the borrower's stock, and proxy on a controlling interest of the borrower's subsidiary, did not establish actual control over the operations of the corporation in general; but, at most, demonstrated the potential for influence over some business decisions. *Id.* at 631-32.

Thompson only as support for its rejection of a " "culpable participation' requirement, which requires a showing that [the defendant] actually participated in the alleged violation". *Id.* at 631.

It is clear that *Thompson* did not definitively address prong one of the *Metge* test, *i.e.* a required showing that the defendant exercised control over the general operations of the wrongdoer; nor did it adopt the two prong *Metge* test, as urged by appellees in reliance on the Seventh Circuit's opinion in *Schlifke,* 866 F.2d at 949; and, conversely, *Metge* did not cite *Thompson* as support for its formulation of prong one (only, as stated *supra,* as support for prong two).

Thus, the law is somewhat more unsettled as to prong one than Home and Graham would have it. Our decision in *Dennis v. General Imaging, Inc.,* 918 F.2d 496 (5th Cir.1990), however, provides some guidance on that narrow ground. There we adopted a district court opinion, which interpreted *Thompson* as requiring a plaintiff,

for a *prima facie* case, to show "actual power or influence over the controlled person".[18] *Id.* at 509.

Dennis is consistent with *Metge* to the extent that both require a separate showing of control over the controlled entity (Equity); but appellants insist that our circuit only requires that they show Home and Graham's *power* to control Equity, *not the actual exercise* of that power. We need not presently analyze the above distinction because, even assuming that only the former applies, a reasonable jury could not so find based on the record before us.

According to the affidavits of John MacGregor (assistant vice president of Home), and Glick (Graham), neither Home nor Graham nor their respective employ-

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18 We note that *Dennis* does not accurately reflect our rejection in *Thompson* of a "culpable participation" requirement. 918 F.2d at 509. We need not resolve this inconsistency, because our holding turns on appellants' failure to establish Home and Graham's power to control Equity.

ees and representatives were stockholders, directors, officers, employees, or partners of Equity; they did not attend its board or committee meetings; they were not involved in decisions by Equity to purchase properties for syndications to investors; they were not involved in operations of properties purchased by Equity or its affiliates; and they were not otherwise involved in the general operations of Equity, including business, financial and marketing plans.

Appellants fail to contradict these statements with evidence of Home and Graham's power to control the general affairs of Equity. Graham's involvement with the issuance of financial guarantee bonds for other Equity projects,[19] and correspondence reflecting that Equity kept Graham informed of the status of the Courtside offering, as well as others, does not indicate that Graham

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[19] Glick testified that he had reviewed roughly a dozen PPM's for other Equity projects in his capacity as agent or broker.

had such power, even assuming its participation in such discussions.

Appellants' remaining evidence is less persuasive, as it narrowly relates to Home and Graham's involvement in the Courtside transaction.[20] Although appellants make much of Home and Graham's influence over the formation of the E-C partnerships, *see infra*, and the statement in an internal Graham memo (dated March 6, 1986) from Thomas Pine to Glick that, "[w]ithout Home, Courtside wouldn't have been done", this evidence is not probative of Home and Graham's influence beyond the Courtside transaction. Accordingly, summary judgment on this claim was proper.

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20 Appellants point to Home and Graham's influence over the execution and contents of certain financing documents; their request to approve documents relating to the transaction, including the PPM (which contained exculpatory language requested by Home); and memoranda from Glick to Equity, discussed *supra*, regarding suggested changes to the PPM.

2. Aider and Abettor

Appellants maintain that fact issues remain concerning Home and Graham's liability under § 10(b) of the 1934 Act[21] and Rule 10b-5.[22] Those who aid and abet

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21 Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national security exchange¾
>
> (b) To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance....

15 U.S.C. § 78j(b).

22 Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly ...
>
> (a) to employ any device, scheme, or artifice to defraud,
>
> (b) to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading or

securities fraud are subject to Rule 10b-5 liability; but, we have emphasized recently that this "added layer of liability ... is particularly problematic.... We should be exacting in determining whether aider and abettor liability can be demonstrated". *Akin v. Q-L Invest., Inc.*, 959 F.2d 521, 525 (5th Cir.1992).

To establish liability, the plaintiff must show (1) that the primary party committed a securities violation; (2) that the aider and abettor had "general awareness" of its role in the violation; and (3) that the aider and abettor knowingly rendered "substantial assistance" in furtherance of it. *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1126 (5th Cir.1988) (internal quotations omitted), *vacated, Fryar*

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1992).

v. Abell, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989).[23]

For the first element, we again assume underlying securities fraud. *See* notes 27 and 28, *infra*. Underlying the other two elements—"general awareness" and "knowing substantial assistance"—is a single scienter requirement that varies on a sliding scale from "recklessness" to "conscious intent". *Abell*, 858 F.2d at 1126-27. The plaintiff must show conscious intent, unless there is some special duty of disclosure, or evidence that the assistance to the violator was unusual in character and degree. *Akin*, 959 F.2d at 526, 531.[24] In the latter two instances, a recklessness standard applies.[25] *Id.*

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[23] Although *Abell* has been vacated, it remains authoritative on the non-RICO issues. *First Nat. Bank of Commerce v. Monco Agency, Inc.*, 911 F.2d 1053, 1061 n. 15 (5th Cir.1990).

[24] This court has often reiterated that, "[i]f the evidence shows no more than transactions constituting the daily grist of the mill, we would be loathe to find 10b-5 liability without clear proof of

Throughout the district court proceedings, appellants maintained that Equity violated § 10 and Rule 10b-5 by inducing appellants to invest in Courtside through

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intent to violate the securities law". *See, e.g., Abell,* 858 F.2d at 1126 (*quoting Woodward v. Metro Bank,* 522 F.2d 84, 97 (5th Cir.1975)).

[25] Our court defined "recklessness" in *Broad v. Rockwell International Corp.,* 642 F.2d 929, 961-62 (5th Cir.1981), *cert. denied,* 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 380 (1981):

> Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.
>
> As noted in *Akin,* 959 F.2d at 526 n. 2, although we used the modifier "severe", our definition of recklessness is the same as applied by other circuits.

oral and written misrepresentations.[26] Their aiding and abetting allegations were based on Home and Graham's continued participation in the Courtside transaction despite their receipt of the Duane Memo, which, according to appellants, provided a blueprint of Equity's fraud.

The district court concluded that the summary judgment record lacked probative evidence of Home and Graham's "substantial assistance" in the alleged violations,[27] relying primarily on its findings that they did not owe appellants a duty of disclosure, and that the activities described were simply "grist of the mill". We

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26 As discussed *infra*, subsequent to final judgment, appellants attempted to recharacterize the primary violation (adding Rule 10b-9).

27 Contrary to appellants' assertions, the district court did not find genuine issues of material fact concerning the existence of a primary securities violation; rather, noting appellants' settlement with Equity, it merely assumed so to abbreviate its analysis.

agree, and stress that appellants also failed to meet the scienter requirement underlying the latter two elements of the *prima facie* case.[28]

First, we address appellants' assertion that Home and Graham had a duty to disclose the contents of the Duane Memo. They urge, *inter alia,* that this duty of disclosure arises from Home's status as their surety. Home and Graham counter by stating that generally, a surety has no legal duty of disclosure. As our court noted in *Akin,* the "theory" of liability based on a special duty of disclosure is "mushy and difficult to apply", as the source and scope of such a duty is not based on any textual provision of the securities laws, but "appears to be a specie of federal common law". 959 F.2d at 526. We thus

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[28] As stated, we also assume that fact issues remain concerning Equity's violation of Rule 10b-5. Home and Graham did not challenge appellants' evidence on this element (except with respect to those who allegedly failed to read the PPM); and, as discussed, we do not have the benefit of a district court ruling.

refrain from specifically defining the disclosure obligations of a surety and its agent; rather, applying relevant factors annunciated by our court in *First Virginia Bankshares v. Benson*, 559 F.2d 1307 (5th Cir.1977), *cert. denied, Walter E. Heller & Co. v. First Virginia Bankshares*, 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed.2d 802 (1978), and applied by other circuits, see *Arthur Young & Co. v. Reves*, 937 F.2d 1310, 1330 (8th Cir.1991), *cert. denied Reves v. Ernst & Young*, --- U.S. ----, 112 S.Ct. 1165, 117 L.Ed.2d 411 (1992); *Jett v. Sunderman*, 840 F.2d 1487, 1493 (9th Cir.1988); *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1043 (11th Cir.1986), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1604, 94 L.Ed.2d 790 (1987),[29] we conclude that Home and Graham did not have such a duty.

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[29] Of course, *First Virginia Bankshares* is also precedent for the Eleventh Circuit, because it was decided before October 1, 1981. *See Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

We first examine the parties "relative access to the information to be disclosed". *First Virginia Bankshares*, 559 F.2d at 1314. To be sure, the summary judgment record reflects that Home and Graham were privy to additional information due to their involvement with the issuance of the bonds, and from Graham's prior dealings with Equity; however, as stated, the standard is "relative access to the information *to be disclosed* ". *Id.* (emphasis added). Because appellants neglect to demonstrate that such access supplied Home and Graham with superior knowledge of the allegedly misleading aspects of the PPM,[30] this factor does not weigh in their favor.[31]

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30 By contrast, Glick stated by affidavit:

> None of the information that affiant received from the Equity Group or its securities counsel during the course of his activities described herein, whether oral or written, and whether received prior or subsequent to affiant's receipt of the PPM, in any way contradicted any of the information in the PPM.

We next examine the benefit derived from the sale of securities. Home and Graham received a premium of $257,060 for bonding a risk of almost $5 million. Given the risk of loss, this factor only slightly supports a duty to disclose.

As for the third factor, "the defendant's awareness of plaintiff's reliance on defendant in making its investment decisions", *id.*, appellants once again misconstrue their burden. They must set forth evidence that they *relied on* Home and Graham in making their investment decisions, not that they relied on misrepresentations in the PPM. There is no evidence that potential investors viewed Home and Graham's involvement as approval of the merits of the investment, or otherwise relied on Home and Graham, much less evidence that Home and Graham were "generally aware" of such reliance. Rather,

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[31] The Duane Memo lacks probative value, as it was based solely on the PPM, *see supra*, which was received by each appellant.

Homé's identity as surety was not revealed until the first supplement to the PPM, which also contained a disclaimer specifically included to prevent such reliance.[32] Needless to say, this factor does not support a duty to disclose.

Finally, we can quickly dispose of the fourth factor, "the defendant's role in initiating the purchase or sale", *id.*, as it is undisputed that neither Home nor Gra-

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[32] The supplement stated:

> THE SURETY AND ITS AGENT HAVE NOT MADE ANY INVESTIGATION OR DETERMINATION AS TO THE MERITS, OR RISKS, FINANCIAL OR OTHERWISE, OF THE LIMITED PARTNERSHIP INVESTMENT AND MAKE NO REPRESENTATION NOR EXPRESS ANY OPINION WITH RESPECT THERETO,....
>
> IN EXECUTING THE INVESTOR APPLICATION, EACH INVESTOR ACKNOWLEDGES THAT SUCH INVESTOR HAS INDEPENDENTLY, AND WITHOUT RELIANCE ON THE SURETY, MADE SUCH INVESTIGATION AND INQUIRIES AS THE INVESTOR DEEMED NECESSARY AND PRUDENT TO REACH A REASONABLE INVESTMENT DECISION WITH RESPECT TO THE LIMITED PARTNERSHIP INVESTMENT.

ham had contact with investors regarding their investment decisions. In sum, we conclude from our analysis of the above factors that Home and Graham did not owe appellants a duty of disclosure.

Appellants next maintain that even if Home and Graham lacked a duty to disclose, their participation in the formation of the E-C partnerships constituted "substantial assistance", unusual in scope and degree; thus, they need not prove conscious intent, only recklessness. Once again, we disagree.

Although there is evidence that Home and Graham were included in discussions regarding the possible failure to fully subscribe Courtside by the closing date, we agree with the district court that there is no evidence that their role extended beyond that of a surety and bonding agent. Rather, the only evidence of involvement by Home and Graham was their refusal to bond the remaining 40 units under one partnership, and subsequent agreement to bond the units under four partnerships (the E-C partnerships); decisions central to their designated

function. We thus consider the above assistance, even if substantial, see *Insurance Co. of North America v. Dealy*, 911 F.2d 1096, 1101 (5th Cir.1990) ("the routine extension of a loan does not amount to substantial assistance"), to be merely "grist of the mill".[33]

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[33] The remainder of appellants' evidence on this issue is equally deficient. Namely, they urge that a reasonable jury could conclude that Home and Graham's activities were not simply "grist of the mill" in view of Graham's prior involvement with Equity, and the earlier discussed 1985 internal memorandum from Graham's Pine to Glick stating, *inter alia*, "Reaction to The Home Insurance Company¾positives & negatives compared to A.I.G. etc. Anything that he doesn't like? Without Home, Courtside wouldn't have been done".

As for the former, we conclude that the summary judgment evidence of Graham's involvement as bonding agent for other Equity projects, see *supra* note 19, does not create the inference of particularly substantial or unusual assistance. Our finding to the contrary in *Akin*, 959 F.2d at 531,

Because appellants failed to establish either a duty of disclosure or atypical assistance, they must provide evidence of conscious intent, rather than recklessness. (In considering whether they meet this burden, we assume, without deciding, that Home and Graham's involvement constituted substantial assistance.) The rec-

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is distinguishable. Suffice it to say, the scope and degree of involvement by the defendant/accountant in *Akin* was far greater than that before us.

As for the latter, the above-quoted statement is perhaps probative evidence of Home's substantial assistance, but it is not sufficient evidence from which a jury could conclude that such assistance was unusual. Interpreting the statement, Pine explained that Home was critical to the closing, and more helpful than A.I.G. (National Union Insurance Company) due to its ability to efficiently process the multitude of documents. Of course, contrary inferences are possible, including that urged by appellants; however, such an inference is not sufficient to create a material fact issue.

ord is devoid of such evidence; thus, summary judgment is appropriate. *See, e.g., Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir.1993) (internal quotations omitted) ("Summary judgment, to be sure, may be appropriate, even in cases where elusive concepts such as motive or intent are at issue, ... if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.").

With apparently good intentions, Graham forwarded the Duane Memo to Equity, and suggested that Equity incorporate its counsel's suggestions. Home and Graham's continued participation, despite Equity's failure to adopt some of the suggestions, does not signal their intent to further the fraudulent scheme.[34] As we

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[34] In fact, in addition to appellants' evidence not creating a material fact issue on conscious intent, we question whether it even establishes recklessness. Although the language in the Duane Memo alerts Home and Graham to deficiencies in the PPM, it does not imply that they were "highly unreasonable";

nor does correspondence between Glick and Equity indicate that it was so construed. Rather, Glick requested Equity's "cooperation" in adopting Duane Morris's suggestions, noting that "[f]rom past experience we have found that obtaining another viewpoint on our clients' Memorandums has often resulted in *some worthwhile improvement,* both from a legal and marketing standpoint". (Emphasis added.) Without expressing any opinion as to the merits of Duane Morris's assessment, or discomfort with the adequacy of the Duane Memo, Glick concluded: "I hope these comments will be helpful to you and that they will provide *additional comfort* to The Home Insurance Company in conjunction with the issuance of its bond". (Emphasis added.)

In addition, Glick testified that the supplemental PPM sufficiently addressed the concerns of Home and Graham. Finally, in late December, 1984, Home and Graham received an opinion letter from counsel for Courtside stating that

> [n]othing has come to our attention, after inquiry, which would lead us to believe that the Memorandum (except for the financial statements and other financial and statistical data and the projections in-

stated in *Abell,* 858 F.2d at 1128, "[a]roused suspicions ... do not constitute actual awareness of one's role in a fraudulent scheme. Moreover, to prove plainly that an alleged abettor intended to violate the securities laws, plaintiffs must prove more than that the abettor recklessly ignored danger signals".

Likewise, Home and Graham's receipt of a reasonable premium for participation in the transaction does not supply a motive. We agree with the Second Circuit that "almost any entity playing a role in a securities transaction will have some economic motivation for doing so". *National Union Fire Insurance Co. v. Turtur,* 892 F.2d 199, 207 (2nd Cir.1989).[35]

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cluded therein, as to which we do not express any belief), on the date of the Memorandum, contained any untrue statement of a material fact or omitted to state a material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading.

[35] Appellants also point to Home and Graham's motive to close the deal once involved as surety; however, because appellants did not contend in the district court that the formation

In sum, in view of the lack of evidence of intent, the district court properly disposed of appellants' aiding and abetting claim.[36]

3. Fraud and Negligent Misrepresentation

Appellants maintain Home and Graham's failure to disclose misrepresentations and material omissions in the PPM, brought to their attention through the Duane Memo, constitutes negligent misrepresentation under Louisiana law.[37] To prevail, Louisiana requires proof of

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of the E-C partnerships was fraudulent, or that Home and Graham had knowledge of same, this motive, standing alone, carries little weight.

[36] Appellants' claims under the Louisiana Blue Sky Law were also properly dismissed, because it is undisputed that Home and Graham were not sellers of securities as defined by § 12(2) of the 1933 Act. *Abell*, 858 F.2d at 1130-31.

[37] It is undisputed that Louisiana law applies in this diversity case. Except as to the issue of duty, discussed *infra*, appellants

actual reliance. *Abell*, 858 F.2d at 1131 (applying Louisiana law).[38] Upon reviewing the summary judgment record, we agree with the district court that there is no evidence of reliance on those aspects of the PPM specifically discussed in the Duane Memo.[39]

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waived their fraud claim by failing to properly brief the issue. *See infra* note 50.

[38] Negligent misrepresentation is encompassed within the broad language of articles 2315 and 2316 of the Louisiana Civil Code. *Devore v. Hobart Mfg. Co.*, 367 So.2d 836, 839 (La.1979). In order to recover, the plaintiff must show (1) a legal duty to supply correct information; (2) breach; and (3) damages resulting from justifiable reliance on the misrepresentation. *Commercial Nat. Bank v. Audubon Meadow Part.*, 566 So.2d 1136, 1139 (La.App. 2d Cir.1990).

[39] Of the five appellants: (1) *Koerner* could not recall reading the PPM and provided no pertinent testimony regarding reliance; (2) *Parrish* possibly read parts of the PPM, but could not

recall any specifics nor did he provide pertinent testimony as to factors influencing his investment decision; (3) *Sibley* skimmed the PPM, "not really" relying on its contents but instead relying on oral representations that the project was "low risk" and catered to professionals (which are both inconsistent with the PPM); and (4) *Turnbull* did not read the PPM, and in fact would not have invested had she done so; instead, she relied on her accountant who focused on tax projections; although he read the PPM, there is no evidence of actual reliance on specific misrepresentations or material omissions in it, except for references to the stated fair market value contained in Teel's appraisal, which is irrelevant given the district court's conclusion (in support of summary judgment for Teel) that appellants failed to show that the appraisal was misleading.

Of course, Home and Graham are not responsible for oral misrepresentations inconsistent with, or not pertinent to, aspects of the PPM discussed in the Duane Memo, as appellants' action against them is based on appellees' failure to correct or otherwise disclose misleading information referenced

In fact, on appeal, appellants do not challenge the court's finding on reliance;[40] rather, for both fraud and negligent misrepresentation, they focus solely on the erroneous proposition that duty of care is a complex issue of fact not suitable for summary judgment. *See Commercial Nat. Bank*, 566 So.2d at 1140 (stating that the existence of a duty is a question of law); *see also Hibernia Nat. Bank v. Carner*, 997 F.2d 94, 98 (5th Cir.1993) ("it is insufficient for the nonmovant to argue in the abstract that the legal

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in the Duane Memo, and their continued participation in the Courtside transaction despite their knowledge of same.

[40] In their motion for summary judgment, Home and Graham specifically pointed to appellants' failure to allege actual reliance in support of the state law claims of fraud and negligent misrepresentation. In response, appellants failed to point to specific evidence of reliance; nor did they do so in their motion for a new trial, despite the district court's finding. And, as stated, they fail to assert error on appeal. As a result, our review of the record is without assistance from those with the burden of proof.

theory involved in the case encompasses factual questions"). Needless to say, this assertion of error is wholly without merit.

4. Indemnity Agreements

Appellants maintain that fact issues remain concerning the enforceability of their indemnity agreements.[41] Relying on *National Union Fire Insurance Co. v. Turtur*, 892 F.2d 199 (2d Cir.1989),[42] they urge that where

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41 As stated *supra*, the investors sought rescission of the agreements; Home counterclaimed for their enforcement. The district court granted summary judgment in favor of Home on the rescission action and subsequently granted it on Home's counterclaim. On appeal, appellants focus on the latter.

42 In *Turtur*, National Union issued a bond in exchange for the investor's execution of an indemnification agreement, which was attached to the PPM. The Second Circuit held that, if the indemnification agreement and the subscription agreement are considered under New York law as *interdependent*, "a fraudulent inducement as to one of the contracts *might* [ ], in at least some

a surety receives an indemnity agreement from the investor in return for bonding the investor's obligations, and the separate subscription and indemnity agreements are executed contemporaneously, fraudulent inducement in the subscription agreement renders the indemnity agreement likewise fraudulently induced and thus unenforceable. Finding no basis for the foregoing proposition under federal or Louisiana law,[43] we reject it.

In *Dealy*, we held that an indemnity agreement is unenforceable due to fraud in the subscription agree-

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situations, excuse performance by the defrauded party of the other contract". *Id.* at 204 (emphasis added). The Second Circuit reversed the grant of summary judgment because fact issues remained on the interdependency *vel non* of the agreements. *Id.* at 205.

[43] It has been agreed in the district court and on appeal that the indemnity agreements should be construed under Louisiana law.

ment where the surety was "a party to the fraud [as an aider or abettor] or a coconspirator in it". 911 F.2d at 1100.[44] We thus apply the reasoning of *Dealy,* and conclude that because appellants have failed to produce more than a scintilla of evidence of Home and Graham's involvement in the alleged fraud, *see supra,* federal law does not provide a defense.

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[44] There, an investment bond insurer brought suit against the insured, an investor in a limited partnership. Like the case at bar, the investor paid partly in cash and partly in the form of a promissory note payable to the partnership. The partnership in turn secured a loan with the investor's note, which the surety bonded in return for an indemnity agreement executed by the investor. Subsequent to the investor's default, the surety brought suit against the investor to enforce the indemnity agreement. In defense, the investor asserted that the indemnification agreements were contracts related to a securities fraud and thus unenforceable. *Id.* at 1098, 1100.

Our analysis of Louisiana law produces the same result. Even if we construe the indemnity and subscription agreements as interdependent,[45] we conclude that appellants, at a minimum, must meet the requirements of La.Civ.Code.Ann. art 1956, which provides: "Fraud committed by a third person vitiates the consent of a contracting party if the other party knew or should have known of the fraud".[46] *Cf. Breaux v. Equity Group,* 1989 WL 1764 *2, 1989 U.S.Dist. LEXIS 235 *5 (E.D.La.1989).

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[45] We emphasize that we are assuming, for purposes of our discussion, that the agreements should be considered interdependent under Louisiana law. *Compare General Ins. Co. v. Fort Lauderdale Partnership,* 740 F.Supp. 1483, 1488 (W.D.Wash.1990) (distinguishing *Turtur* and concluding, that, under Washington law, the indemnification agreement was independent).

[46] *Turtur* is not necessarily inconsistent. There the court concluded that appellants had raised a fact issue as to whether the bond insurer was "a party to any fraud or illegality affecting

To satisfy article 1956, appellants must not only show that a reasonable jury could find the requisite knowledge based on the Duane Memo (and subsequent insertion of exculpatory language in the PPM), but, also, that error resulting from the alleged misrepresentations and material omissions contained in the PPM, and referenced in the Duane Memo, "substantially influenced that consent". La.Civ.Code.Ann. art. 1955. Because the summary judgment record is lacking on evidence of reliance, *see supra* note 39, appellants' fraud defense fails. *See In re J.M.P.*, 528 So.2d 1002, 1010 (La.1988) (stating that to vitiate consent on the ground of fraud, "the party who asserts that the obligation is null must prove some

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the [Notes]". 892 F.2d at 205; *see Bruce v. Martin*, 1993 WL 148904, ** 10, 11, 1993 U.S.Dist.LEXIS 5776, ** 32, 33 (S.D.N.Y. April 28, 1993) (restricting *Turtur* to "a situation where the fraud in the inducement of the subscription agreements ... was the same fraud to which the surety was alleged to be a party").

type of causal relationship between his consent and the vice that influenced it").[47]

Appellants next assert that even if the indemnity agreement is independent, rather than interdependent, and thus unaffected by fraud in the inducement of the subscription agreement, it does not obligate them to indemnify Home. A contract of indemnity is construed in accordance with the general rules governing contract interpretation—"[w]hen the words of a contract are clear, *unambiguous,* and lead to no absurd consequences, the contract is interpreted by the court *as a matter of law.*"

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[47] We also reject appellants' attempt to nullify the indemnity agreement based on the "failure of cause". "Cause is the reason why a party obligates himself". La.Civ.Code.Ann. art. 1967. According to appellants, "[i]f the partnership agreement is extinguished by fraud, the cause for the indemnity contract no longer exists". This, of course, cannot be; otherwise, the validity of all such indemnity agreements would unconditionally hinge on the validity of the separate subscription agreement.

Carter v. BRMAP, 591 So.2d 1184, 1188 (La.App. 1st Cir.1991) (emphasis in original). "Agreements to indemnify are strictly construed and the party seeking to enforce such an agreement bears the burden of proof." *Liem v. Austin Power, Inc.*, 569 So.2d 601, 608 (La.App. 2d Cir.1990).

The indemnity agreement provides:

> The [investor] will protect, indemnify, and save harmless [Home] from and against any and all liability, loss, costs, damages, fees of attorneys, and other expenses which [Home] may sustain or incur under or in connection with the Bonds hereunder, or in connection with this Agreement, for:
>
> . . . . .
>
> (c) all demands, liabilities, losses, charges and expenses of every kind, which [Home] may become liable to pay or have paid by reason of or in consequence of the execution by [Home] of the Bonds in favor of the [investor].

The referenced bonds provide that "[a] default occurs regardless of whether the Principal for any reason shall have no legal obligation to discharge his, her or its obligations *under the Notes* to the *Obligee* or the *Permitted As-*

signee whichever holds the Note(s) which are guaranteed in part by the Surety ". (Emphasis in original.) In the same paragraph, Home waives its defenses to payment.[48]

In view of this language, we conclude that the indemnity agreement encompasses fraud; however, even if we accept appellants' assertion that the contract is ambiguous and thus look outside the contract to discern the parties' intent, appellants nonetheless fail to create a material fact issue. The first supplement to the PPM evidences Home's intent that the indemnity agreement impose an unconditional obligation on the investors.[49] Ap-

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[48] The bonds provide: "Surety waives for the benefit of the *Permitted Assignee* only all defenses of any kind either Surety or any Principal might have with respect to any or all Note(s) or the obligation to pay any or all Note(s) *up to the Sub-Limit of Liability applicable on each Note or the Limit of Liability as defined herein* ". (Emphasis in original.)

[49] It states:

pellants, on the other hand, did not adduce evidence demonstrating their intent. Accordingly, uncontradicted evidence establishes that the indemnity agreements do not provide a defense to enforceability. *See Carter*, 591 So.2d at 1192 (granting summary judgment where non-movant failed to raise a genuine issue of material fact as to the contract's proper interpretation).

We summarily dismiss appellants remaining two bases for nullifying their obligations.[50] First, appellants'

> Because each investor's obligation to the Surety under the Indemnification and Security Agreement is unconditional, the result may be that the investor will be obligated to make payments to the Partnership or a financial institution even though it may have a claim against the lender of the Term Debt or the Partnership. The essence of the Financial Guarantee Bond is that each investor's obligation to make payments on the Installment Notes are absolute and may not be avoided or postponed for any reason.

[50] In addition, we refuse to consider those issues that were not raised in district court ("the abuse of rights doctrine"), or properly briefed on appeal (La.Civ.Code Ann. art. 1759 and 1772). *See Jernigan v. Collins*, 980 F.2d 292, 297 n. 1 (5th Cir.1992) (issues

reliance on codal suretyship arguments is misplaced. They seek to nullify the indemnity agreements, not their obligation to Home arising from Home's issuance of the bonds.[51] As stated in *Commercial Union Ins. Co. v. Melikyan*, 430 So.2d 1217, 1221 (La.App. 1st Cir.1983), a contract on indemnity is different from a contract on suretyship:

> The contract of indemnity forms the law between the parties and must be interpreted according to its own terms and conditions.... [I]n an indemnity contract, the principal and indemnitors can be bound to the surety in any

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waived if presented for the first time on appeal), *cert. denied*, — U.S. —, 113 S.Ct. 2977, 125 L.Ed.2d 675 (1993); *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1255 (5th Cir.1990) (same regarding issues raised for the first time in a reply brief).

[51] Pursuant to La.Civ.Code Ann. art. 3052, a surety who has paid the debt of a principal/debtor has a right of indemnification from the debtor, subject to certain restrictions.

manner they elect in consideration of the surety issuing the bond covering the principal obligation.[52]

Second, we reject appellants' attempt to void the indemnity agreements pursuant to § 29(b) of the 1934 Act, 15 U.S.C. § 78cc(b).[53] The indemnity agreements, standing alone, were not made or performed in violation

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52 *See also Liem*, 569 So.2d at 608 (reiterating that the indemnity contract "forms the law between the parties," and noting that "[t]he purpose of an indemnity agreement is to allocate the risk inherent in the activity between the parties to the contract").

53 Under § 29(b), an innocent party may avoid a contract if (1) the contract was made or performed in violation of the securities laws; (2) the plaintiff is in contractual privity with the defendant; and (3) the plaintiff is in the class of persons the statute was designed to protect. *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552, 559 (5th Cir.1982).

of the securities laws.[54] *See, Regional Properties, Inc.*, 678 F.2d at 561 n. 16.

In sum, appellants failed to establish a material fact issue regarding the enforceability of the indemnity agreements. Accordingly, in view of their plain meaning, we conclude, as a matter of law, that investors are obligated to Home, and thus affirm the summary judgment. In so doing, we complete our review of the summary judgment, and turn to appellants' contentions concerning the district court's post-judgment rulings.

B. Post-Judgment Rulings

Appellants object to the rulings on their attempt to rely on a newly raised legal theory as a basis for reconsideration of the summary judgment. Judgment was entered on January 31, 1992. Ten days later (February 10), appellants moved for a new trial (Fed.R.Civ.P. 59),

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[54] As stated *supra*, they maintain that the fraudulently induced subscription agreements rendered the indemnity agreements unenforceable.

reiterating arguments presented in their pre-judgment motions.

A month later (March 9), appellant-investor Turnbull enrolled new counsel, who, on March 27, filed a motion for leave to file a supplemental memorandum in support of the February 10 motion. The supporting memorandum, adopted by the other plaintiff-investors, asserted for the first time that Home and Graham had aided and abetted Equity in violation of Rule 10b-9, issued under § 10(b) of the 1934 Act.[55] The court denied

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55 Rule 10b-9 states in pertinent part:

> It shall constitute a *manipulative or deception device or contrivance,* as used in section 10(b) of the Act, for any person, directly or indirectly, in connection with the offer or sale of any security, to make any representation:
>
> . . . . .
>
> (2) to the effect that the security is being offered or sold on any other basis whereby all or part of the consideration paid for any such security will be refunded to the purchaser if all or some of the securities are not sold, unless the security is part of an offering or distribution being made on the condition

the motion for leave to supplement, stating that "[t]he issues raised in this supplemental memo have never been presented before". Turnbull requested reconsideration.

On April 1, the parties argued the merits of the original (February 10) motion for a new trial. In addition, Turnbull urged that the court consider the Rule 10b-9 theory presented in the supplemental memorandum (which the court had not allowed to be filed), and gave a brief overview of the applicable law. The court agreed with Home and Graham that Rule 10b-9 had not been

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> that all or a specified part of the consideration paid for such security will be promptly refunded to the purchaser unless (i) a specified number of units of the security are sold at a specified price within a specified time, and (ii) the total amount due to the seller is received by him by a specified date.

17 C.F.R. § 240.10b-9 (1992) (emphasis in original).

"Once the part or none representation has been made, it may not be circumvented by transactions primarily designed to create the appearance of a successful offering in order to avoid the refund feature of the offering". *C.E. Carlson, Inc. v. S.E.C.*, 859 F.2d 1429, 1434 (10th Cir.1988).

raised in six years of litigation, and thus refused to consider the new theory/issue. The court also denied the motion for a new trial.

Appellants do not dispute the district court's disposition of their motion for a new trial; rather, they object to its refusal to consider Turnbull's supplemental memorandum. For starters, they contend that simply by raising § 10(b) early on, they put in issue any and all rules adopted pursuant to it. Obviously, this contention is totally without merit. It goes without saying that, in order to be properly raised, an issue must be more specifically framed than as appellants claim. Otherwise, the court, not the parties, would be charged with deciding which claims should be pursued.

Appellants also use more specific approaches to attempt to save this new issue. "[A] trial court *may in the exercise of its sound discretion* allow a tardy amendment stating an additional ground for a new trial." *Dotson v. Clark Equipment Co.*, 805 F.2d 1225, 1228 (5th Cir.1986) (emphasis in original). The district court certainly did

not abuse its discretion, considering the basis for the motion, the length of delay, and the lack of explanation for not having timely raised the issue.

First, we agree with the district court that the Rule 10b-9 theory is "new". (In fact, at the April 1 hearing, Turnbull's counsel admitted that a new theory was being presented: "I suggest that all the facts are before the Court, have been before the Court, and this is simply *another theory.*" (Emphasis added.)) As is apparent from Turnbull's post-judgment efforts and brief on appeal, appellants' theory requires the assertion of legal issues not previously raised;[56] the introduction of additional evidence;[57] and the analysis of a different law.[58]

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56 As appellants point out, Rule 10b-9 is often coterminous with Rule 10b-5; *see Carlson,* 859 F.2d at 1434 (stating Rule 10b-5 proscribes conduct violative of Rule 10b-9); however, the reverse is less often true. Here, for example, appellants' Rule 10b-5 theory was not based on misrepresentations surrounding the alleged "part-or-none offering". Accordingly, among the issues

discussed at length by appellants for the first time were (1) whether Courtside was a part-or-none offering; (2) whether investor funds were used by Equity without first meeting the minimum offering amount; and (3) whether the minimum offering amount was reached through non-bona fide purchases.

Appellants' assertion that these arguments were raised previously is not supported by the record. Evidence of the formation of the E-C partnerships was used primarily to establish Home and Graham's involvement with Equity, not to establish that formation of those partnerships contravened the terms of the offering in violation of § 10 and Rule 10b-5.

57 After the district court's refusal to reopen the case, Turnbull filed a motion requesting that her supplemental memorandum (with attached deposition excerpts and exhibits) be included in the record for appeal purposes, which the court denied, stating: "Mrs. Turnbull's request and her reasons for that request are in the record. That, the court permitted". Turnbull then filed a second motion to supplement the record with approximately 150 pages of deposition excerpts relating to her Rule 10b-9 theory.

The court, referring to *Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir.1992), again denied her attempt to include materials in the appellate record that were not before the district court, stating: "I think they don't belong here. I didn't consider them. There was a new issue that your client is attempting to inject in this record at this late date and I'm just going to not rule in your favor".

Even if the court abused its discretion in refusing to allow Turnbull to supplement the record for appeal, any error is harmless, because our review is limited to the record before the district court when it ruled. *See Topalian*, 954 F.2d at 1131-32 n. 10 ("This court's inquiry is limited to the summary judgment record before the trial court: the parties cannot add exhibits, depositions, or affidavits to support their positions on appeal."). For the same reason, we refuse to consider that evidence as it appears in Turnbull's record excerpts.

[58] In fact, this circuit has not yet determined whether Rule 10b-9 provides a private cause of action, and, if so, whether that encompasses a claim based on allegations of aiding and abetting. *See Bormann v. Applied Vision Systems, Inc.*, 800 F.Supp. 800, 806

The court was under no obligation to permit appellants to interject a new legal theory, without explanation, after they had failed to do so during three years of discovery, two additional years between the court's granting summary judgment and entering judgment, and almost two months following that entry. *See Allied Bank-West, N.A. v. Stein*, 996 F.2d 111, 115 (5th Cir.1993) (internal quotations omitted) ("[m]otions for new trial cannot be used to argue a case under a new legal theory"); *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990) (stating same with respect to a motion to alter or amend);[59] *see also Russ v. International Paper Co.*, 943

(D.Minn.1992) (concluding private action exists under Rule 10b-9); *accord Beaumont v. American Can Co.*, 797 F.2d 79, 84 (2d Cir.1986) (questioning existence of private remedy for violations of Rules 10b-6 and 10b-13).

[59] Of course, in keeping with the district court's "considerable discretion" in deciding whether to reopen a case, we do not read these cases to imply that it lacks discretion to consider a new

F.2d 589, 593 (5th Cir.1991) (denying Rule 59(e) motion for reconsideration because plaintiff did not explain his failure to submit evidentiary materials prior to judgment).[60] As stated, the district court did not abuse its discretion.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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legal theory on a post-judgment motion. *See United States use of American Bank v. C.I.T. Const., Inc.*, 944 F.2d 253, 259 n. 8 (5th Cir.1991) ("district court possesses the discretion to consider a claim raised for the first time in a posttrial motion").

[60] It follows that the court did not abuse its discretion by refusing to review the merits of the supplemental memorandum. Once the court considered the above factors, it was under no obligation to do so.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WALTER R. ABBOTT, ET AL.,	*	CIVIL ACTION
	*	
VERSUS	*	NO. 86-4186
	*	
THE EQUITY GROUP, INC., ET AL.	*	c/w
	*	
	*	NOS. 86-4197, 86-4231
	*	87-3006, 87-3008,
	*	87-3009, 87-3645
	*	
	*	SECTION "L" (4)

The plaintiffs in all three suits were limited partners in Courtside Ltd. ["the Partnership"], a Louisiana partnership formed to buy Courtside Garden Apartments in Houston, Texas. The deal soured and these lawsuits followed.

All defendants except Gerald Teel Company ["Teel"], the Hibernia National Bank ["Hibernia"], and Home Insurance Company and the Graham Company ["Home/Graham"] ultimately settled with the plaintiffs. On a former date, the Court granted Teel's motion for summary judgment with written reasons. Hibernia and Home/Graham's motions for summary judgment were

also heard by the Court. After considering the briefs and arguments of counsel, the applicable law and for reasons orally assigned, the Court granted the motions for summary judgment of Hibernia and of Home/Graham. The Court now issues these supplemental written reasons for its decisions.

Summary judgment is appropriate when:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. F.R.C.P. 56(c).

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 25522553, 91 L. Ed 2d 265 (1986). The Court finds that there are no material issues of fact in dispute insofar as the involvement of Hibernia and of Home/Graham in the sale of Courtside limited partnership interests and that Hibernia and Home/Graham are entitled to judgment as a matter of law.

FACTS

In connection with the investment, each limited partner executed two Installment Promissory Notes payable to the Partnership. All of the initial Investor Installment Notes were pledged by the Partnership to the Hibernia Bank and all of the second Investor Installment Notes were pledged to the Security Savings and Loan Association in Mississippi to secure the Partnership loan.

During the latter part of 1984, forty of the Courtside units remained unsold. The offering period was scheduled to end on January 24, 1985. Any extension of the offering period would have triggered a right of rescission for the existing limited partners of Courtside. Four Louisiana general partnerships (E-C One, E-C Two, E-C Three and E-C Four) were formed to purchase the unsold units. Hibernia loaned the funds to each E-C partnership, requiring the Equity principals to become E-C partners and required each non-Equity partner in the E-C partnerships to execute a solidary continuing guarantee of the entire Hibernia loan.

As additional security for the loan to the Partnership, Home issued Financial Guarantee Bonds naming the banks as Permitted Assignees, with the plaintiffs as principals and the Partnership as obligee. Home received a premium of $257,060. for issuing the bond and agreed to pay the bank if any plaintiff defaulted on the note. As consideration for Home's issuing the bond, each plaintiff executed an indemnity agreement favoring Home for any "liability, loss, costs, damages, fees of attorneys and other expenses" which Home might sustain in connection with the bond and the indemnity agreement.

Graham, Home's agent, analyzed the transaction for Home to determine whether Home should issue the bonds and whether Home should accept the risk of paying for future defaults. Graham sent a copy of Equity's Private Placement Memorandum ["PPM"] to the law firm of Duane, Morris & Heckscher ["Duane Morris"] for review. Following its review of the PPM, Duane Morris prepared a fourteen (14) page memo of comments and criticisms which was forwarded to Graham, and then to

the Equity defendants. Not all of the comments and criticisms contained in the Duane Morris memorandum were incorporated into the supplemental PPMs.

Liability as Sellers

The plaintiffs conceded that Hibernia and Home/Graham were not liable as "sellers" or for aiding and abetting a seller under Section 12(2) of the 1933 Act or under Louisiana Blue Sky Law. Pinter v. Dahl, 486 U.S. 622, 108 S. Ct. 2063, 100 L. Ed. 2d 658 (1988); Abell v. Potomac Insurance Co., 858 F. 2d 1104 (5th Cir. 1988); Pharo v. Smith, 621 F. 2d 656 (5th Cir. 1980); Croy v. Campbell, 624 F. 2d 709, 713, n. 5 (5th Cir. 1980).

Liability as control persons

Hibernia and Home/Graham contended that they were not control persons under Section 15 of the Securities Act of 1933 ["1933 Act], under Section 20(a) of the Securities Exchange Act of 1934 ["1934 Act"], or under the Louisiana Blue Sky Law, La. R.S. 51:714B (West 1987), formerly La.R.S. 51:715B. The Court agrees with that contention. G. A. Thompson & Co., Inc. v. Partridge, 636

F. 2d 945 (5th Cir. 1981); Cameron v. Outdoors Resorts of America, 608 F.2d 187, 194-195 (5th Cir. 1979), modified on other grounds 611 F.2d 1045 (5th Cir. 1980).

Section 15 of the Securities Act of 1933 makes a party who controls a Section 12(2) seller jointly and severally liable with that seller for the seller's violation of Section 12. Section 20(a) of the Securities Act of 1934 provides for liability against one who controls a primary violator of Section 10b and Rule 10b-5. The control person sections of both acts are analogous and are given the same interpretation. Pharo v. Smith, supra. "The term 'control' ... means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise." Thompson, 636 F. 2d at 957-958. The burden of establishing control is on the plaintiff. Id. and cases cited therein. See also Metge v. Baehler, 762 F. 2d 621, 630-631 (8th

Cir. 1988).[1] [The lending bank was not a controlling person of an investment company selling limited shares in real estate programs despite the fact that the bank was the primary lender, held nearly twenty percent (20%) of the company's stock, held a proxy on a fifty-one percent (51%) block of the company's subsidiary, sent personnel

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[1] The Eighth Circuit Court of Appeals in Metge established a two part test for controlling person liability:

> [P]laintiffs must establish, first that the defendant lender actually participated in (i.e. exercised control over) the operation of the corporation in general; then he must prove that the defendant possessed the power to control the specific transaction or activity upon which the primary violation is predicated, but he need not prove this later power was exercised. Metge, 762 F. 2d at 631.
>
> The Fifth Circuit has not yet expressly adopted the Metge two part test, even though the Seventh Circuit has interpreted the Fifth Circuit's Thompson decision, which predated Metge, as doing so. Schlifke v. Seafirst Corporation, 866 F. 2d 935 at 949 (7th Cir. 1989). Irrespective of whether the Fifth Circuit has or has not officially adopted the Metge test, this Court finds that Hibernia and Home/Graham are not controlling persons.

to the company's board meetings and had certain authority over the company's issuance of capital stock.]

Hibernia

In this case, the plaintiffs failed to prove that Hibernia had the potential for or did in fact control the sale of the Partnership interests. The affidavit of Philip E. Martin, the loan officer responsible for servicing the Courtside loan; stated that Hibernia had no contact with the individual limited partners and was not involved in the Courtside solicitation/sale other than as a lender. Upon reviewing all of the evidence submitted,[2] the

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[2] Plaintiffs argued that the following evidence proved that Hibernia controlled the Equity Group defendants: Hibernia's Loan Summary III, the November 1983 Loan Agreement, testimony of Mark Strauss, Courtside financial statement, January 7, 1985 Loan Agreement, commitment letter of September 27, 1984, continuing guaranty of E-C plaintiff Gitter, Courtside financial statement 10/84-12/84, January 17, 1985 memo from Joe Michelli, Courtside Loan Request, June 7, 1984 letter from Phil Martin of Hibernia to Mark Strauss of Equity, testimony of Phil Martin, portion of the complaint, Braddke promissory note. [Record #671, Exs. 1 - 15].

Court finds that all of Hibernia's activities in this matter related to its role as a lender. Hibernia's requirements on the borrowers before it would commit to lending $2.8 million do not constitute control under the 1933 and 1934 Security Acts or under La. R.S. 51:714B. "[T]he fact that the Bank extended a loan to a company to finance its investment programs and took measures to secure its loans does not establish actual exercise of control. See Metge, 762 F. 2d at 631...." Schlifke v. Seafirst Corporation, 866 F. 2d 935, 949 (7th Cir. 1989).

Home/Graham

The evidence submitted on the Home/Graham involvement with the Equity Group defendants is equally unpersuasive. The affidavits of John MacGregor (assistant vice president of Home in charge of its Fidelity and Surety department) and Philip Glick (vice president of Graham Company) prove that the relationship of Home and Graham with the Equity defendants and with the plaintiffs was simply one of surety and bonding agent. Home/Graham were parties to the various dis-

cussions about forming the E-C partnerships in January, 1985. However, there was no evidence that Home/Graham's participation in those discussions was more than as the surety/bonding agent. The main thrust of plaintiffs' argument that Home/Graham were controlling persons rests on their engagement of the Duane Morris law firm to review the Courtside PPM. That action on the part of Home/Graham, however, is fully consistent with their investigation of the wisdom of bonding this real estate venture.

For these reasons as well as those orally assigned, the Court finds that Hibernia and Home/Graham were not "controlling persons" under federal or state securities law.

Liability as Aiders and Abettors

The plaintiffs also sued Hibernia and Home/Graham as aiders and abettors under Section 10b of the 1934 Act and Rule 10b-5. The court finds that those claims are without merit.

To establish aider and abettor liability under Rule 10b-5, "(1) [t]here must have been a securities violation

by the primary party;[3] (2) [t]he aider and abettor must have had a 'general awareness' of its role in a Rule 10b-5 violation; and (3) [t]he aider and abettor must have 'knowingly and substantially assisted' in the Rule 10b-5 violation." Bane v. Sigmund Exploration Corp., 848 F. 2d

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[3] A primary violation of Section 10(b) includes the following elements: (1) a scheme; (2) in connection with the purchase or sale of a security; (3) through the use of an instrumentality of interstate commerce in connection with the scheme; (4) which scheme includes a misstatement or omission (5) of material fact; (6) made knowingly or with scienter; (7) on which each plaintiff reasonably relied; (8) against which each plaintiff exercised due diligence; and (9) which misstatement or omission proximately caused both the transaction and each plaintiff's pecuniary injury. Abell v. Potomac Insurance Co., 858 F. 2d 1104, 1115-1118 (5th Cir. 1988); James v. Meinke, 778 F. 2d 200, 204 (5th Cir. 1985).

Since the plaintiffs settled their disputes with the Equity defendants prior to trial, the outset question of whether there was a primary violation of securities law on Equity's part remains unanswered. Regardless of whether there was or was not a primary violation, the Court finds that the involvement of Hibernia and Home/Graham in the Courtside transaction did not rise to the level of aiding and abetting under Rule 10b-5.

579, 581 (5th Cir. 1988).[4] See also Woodward v. Metro Bank of Dallas, 522 F. 2d 84, 97 (5th Cir. 1975)[5] ["In a case combining silence/inaction with affirmative assistance, the degree of knowledge required should depend on how ordinary the assisting activity is in the business

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[4] In Bane, Landmark Bank of Fort Worth ["Landmark"] served as an escrow agent, loaned money to investors in oil and gas drilling programs, and allowed the principal defendants to include Landmark forms in investor packets. These activities, the plaintiff argued, lent credibility to the investment scheme as a whole and constituted knowing and substantial assistance to the 10b-5 violation. The documents included in the oil and gas offering were credit applications and requests for financial statements, but none of the documents made any representations regarding the reliability of the principal defendants or of the risks of investing in the project. In granting summary judgment, the court specifically found that Landmark did nothing more than engage in routine banking activities. The Fifth Circuit affirmed.

[5] In Woodward, a widow had signed promissory notes with a bank in connection with a deal which turned out to be fraudulent. The bank tried to collect on the notes. She alleged the bank was an aider and abettor under 10b-5 and could not collect on the notes. The Court found that the bank was not an aider and abettor.

involved. If the evidence is that the transaction is 'daily grist of the mill,' then there can be no 10b-5 liability without clear proof of intent to violate. If the transaction is atypical or without business justification then the court may infer knowledge."]

Plaintiffs also argued that recklessness satisfies the scienter requirement. However, the Fifth Circuit explained that "[s]evere recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it. [Broad v. Rockwell International Corporation, 642 F. 2d 929, 961-962 (5th Cir. 1981)] (Emphasis in original)." Warren v. Reserve Fund, Inc., 728 F. 2d 741, 745 (5th Cir. 1984). There was no evidence presented in this case which even approached the reckless standard required for scienter.

In this case, plaintiffs primarily focused on the silence of the defendants Hibernia and Home/Graham. Whether silence and inaction can fulfill the substantial assistance requirement turns on the nature of the duty owed by the alleged aider and abettor to others.

> When it is impossible to find any duty of disclosure, an alleged aider and abettor should be found liable only if scienter of the high n conscious intent" variety can be proved. Woodward, 522 F. 2d at 97.

Accord Abell v. Potomac Ins. Co., 858 F. 2d 1104, 1127 (5th Cir. 1988) [The Fifth Circuit reversed the jury's verdict against a law firm as aider and abettor because (1) the law firm only provided legal services that "[constitute] the daily grist of the mill; n and (2) there was no clear proof of intent to violate the securities laws: "[A]t best, the evidence shows only that [the law firm] recklessly disregarded its duties to its clients and ignored several warning signs that the jury could have found aroused the law firm to suspect the propriety of the offering. Aroused suspicions, however, do not constitute actual awareness of one's role in a fraudulent

scheme." Id. at 1128]. "Rule 10b5 is violated by nondisclosure only when there is a duty to disclose. Chiarella v. United States, 445 U.S. 222, 235, 100 S. Ct. 1108, 1118, 63 L. Ed. 2d 348 (1980)." Jett v. Sunderman, 840 F. 2d 1487, 1492-1493 (9th Cir. 1988). See also Schneberger v. Wheeler, 859 F. 2d 1477, 1480-1481 (llth Cir. 1988) [Summary judgment was granted dismissing aiding and abetting claims against bank which had lent money to limited partnerships because the court found that knowledge that the sponsor of a limited partnership was in a shaky financial situation imposed neither a duty to disclose this information nor knowledge of fraud.":]

In determining whether a duty to speak arises, the Court considers the following factors: "the relationship between the plaintiff and defendant, the parties' relative access to the information to be disclosed, the benefit derived by the defendant from the purchase or sale, defendant's awareness of the plaintiff's reliance on defendant in making its investment decisions, and defendant's role

in initiating the purchase or sale." First Virginia Bankshares v. Benson, 559 F. 2d 1307, 1314 (5th Cir. 1977).

Applying this law to the facts adduced below, the Court finds that the plaintiffs failed to show that either Hibernia or Home/Graham had a duty to disclose any information to the plaintiffs and accordingly the aiding and abetting claims of the plaintiffs must fall.

Hibernia

The plaintiffs sought to prove Hibernia's substantial assistance to the alleged fraud because of its role in financing the venture, its knowledge of the financial risks involved, and its silence about alleged deficiencies in the PPM. The plaintiffs, however, failed to demonstrate that Hibernia had a duty to speak. First Virginia Bankshares, supra.

The evidence submitted both in support of and in opposition to this motion showed that Hibernia had no direct contact with the plaintiffs and that the investors did not look to Hibernia for investment advice. Admittedly, Hibernia had read the PPM and had conducted its own analysis of the project in determining to make the

original loan to Courtside Ltd. in November of 1984 [Martin deposition at pp. 120-125], but there is no evidence that Hibernia's review of the transaction was made on behalf of, or in order to benefit, the plaintiffs. There is also no evidence that Hibernia played any role in initiating the purchase or sale of the Courtside limited partnerships.

Accordingly, the Court finds that Hibernia's actions were all related to its role as a lender. Hibernia had no duty to disclose information to the plaintiffs and the aiding and abetting claim of plaintiffs against Hibernia must be dismissed.

Home/Graham

The Court also finds the evidence insufficient to prove aiding and abetting liability on the part of Home/Graham.

Plaintiffs argued that Home/Graham's activities were more than "daily grist of the mill" because they actively participated in the scheme, had superior knowledge of deficiencies in the PPM through the memo of the

Duane Morris law firm and knew that the Equity Group did not include all of the Duane Morris suggestions in PPM supplements. Plaintiffs also contended that Home/Graham, as plaintiffs' surety, owed a duty to disclose the deficiencies of which they were aware and Home/Graham's failure to disclose those deficiencies was aiding and abetting Equity's illegal scheme. To prove Home/Graham's substantial assistance to the alleged illegal scheme, plaintiffs point out that Home drafted some of the exhibits included in the PPM [bond/indemnity agreements], Home approved the creditworthiness of the general limited partners before issuing the bond and Home/Graham failed to disclose to the plaintiffs the contents of the Duane Morris memorandum. As with Hibernia, however, the plaintiffs must first show that Home/Graham had some duty to disclose before silence can be held to be substantial assistance in aiding and abetting. This they cannot do.

Considering the relevant factors [First Virginia Bankshares, supra], the Court finds that Home/Graham owed the plaintiffs no duty to disclose.

First, the mere fact that Home/Graham served as plaintiffs' surety imposes no duty to disclose. "In general, a surety does not owe a fiduciary duty to its principal, ... and no duty to disclose arises absent a fiduciary duty." National Union Fire Ins. Co. v. Turtur, 1988 CCH Sec. L.R. para. 93,765 (S.D. N.Y. 1988). See also National Union Fire Insurance Co. v. Cooper, 1989 CCH Fed. Sec. L. R. para. 94,452 (S.D.N.Y. April 18, 1989)[6] ["The research efforts National Union expended were solely for

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6 In Cooper supra, National Union issued bonds guaranteeing payment of limited partner installment notes. the notes were assigned to secure a loan made to the ban. the limited partners executed indemnity agreements to reimburse National Union for payment it might have to make on the notes to the bank on their behalf. Following the limited partners' default, National Union paid the bank under the bond and sued the investors on the indemnity agreements. The investors filed counterclaims alleging aiding and abetting violations of Rule 10b-5 on the part of National Union. The investors claimed that National Union had facilitated and was responsible for the general partners' fraud. the investors claimed that National Union owed them a duty to disclose which entitled the investors to rely on National Union's investigation. The Court found that National Union's investigation was for its own benefit in assessing its own risks in guaranteeing the notes and that National Union had no duty to disclose the results of its investigation to the investors.

its own purposes;.. If the investors drew the conclusion that the investment would prosper from National Union's guarantee of their own promises to pay, they did so at their own risk." Id. at 92,905-92,906]; National Union Fire Insurance Co. v. DeLoach, 708 F. Supp 1371 (S.D.N.Y. 1989).[7]

Second, the plaintiffs and Home/Graham each had equal access to the information to be disclosed since they reviewed the very same PPM. Third, the $257,060. premium it received for accepting the risk of bonding was not a substantial benefit under the circumstances and it was the only benefit derived by Home/Graham from the Courtside transaction. Fourth, there has been no evidence that Home/Graham knew that potential investors would rely on any alleged misrepresentations in

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7 In Deloach, supra, investors sued under indemnity agreements alleging aiding and abetting violations resulting from National Union's (1) reviewing and approving representations appearing in the PPM, (2) deviating from internal underwriting procedures in issuing the bond, (3) disregarding negative information in order to close the deal and collect its fee, and (4) failing to reveal its extensive knowledge tot he limited partners, 708 F.Supp. at 1378. The Court found that National Union owed the investors no duty to disclose. Id. at 1379, 1383.

the PPM. Fifth, the Court finds that any role Home/Graham may have had in initiating the purchase or sale was minimal. Home/Graham's commitment to issue financial guaranty bonds, their arrangements for indemnification agreements with general partners, their review of the suitability of and the r approval of all investors were simply the "daily grist of the mill." The offering materials with which Home/Graham were involved were all in the area of the gathering of financial data necessary to decide whether to bond the transaction: investor applications, financial guaranty bond, and financial exhibits accompanying the PPM.

Accordingly, the Court finds that, like Hibernia, Home/Graham is not liable as an aider and abettor under Section 10(b) of the 1934 Act and Rule 10b-5.

Liability under Louisiana state law

The Court finds no liability on the part of Hibernia or Home/Graham for negligent misrepresentation or fraud under Louisiana state law.

The Court has already discussed its findings that Hibernia and Home/Graham did not make any misrepresentations to the plaintiffs and nor did they have a legal duty to disclose information to plaintiffs. Absent any legal duty, there is no claim for misrepresentation under Louisiana law. See generally, Abell, 858 F.2d at 1131, n. 33; Devore v. Hobart Mfg. Co., 367 So 2d 836 (La. 1979). Moreover, Louisiana requires proof of actual reliance to sustain claims for negligent or fraudulent misrepresentation under state law. Abell, 858 F. 2d at 1131, n. 31 and the cases cited therein. Even assuming arguendo that there was some evidence that Hibernia or Home/Graham made negligent or fraudulent misrepresentations to the plaintiffs, there was no evidence that any of the plaintiffs actually relied on any such alleged misrepresentations in making their investment decisions. There was likewise no evidence that the investors looked to Hibernia or Home/Graham for information concerning their investment or that they put trust and confidence in them except to the extent that Hibernia and Home/Graham would each fulfill its professional obli-

gations. There was also no evidence that Home/Graham reviewed the PPM on behalf of, or in order to benefit, the plaintiffs. Hibernia and Home/Graham's participation in the sale of limited partnership in Courtside was routine and merely facilitated the underlying transaction.

Plaintiffs' contention that there was an agreement among Home/Graham and the Equity Group to deceive the investors is without merit. The evidence shows that the parties disagreed as to whether or not the PPM omitted or misrepresented material information. [March 11, 1988, deposition of Mark Fullmer, pp. 7374; March 16, 1988, deposition of Donald Auten, pp. 165, 169, 171, 173, 179.] It is illogical to infer that there was any agreement to defraud investors between Home/Graham and Equity when the parties to the alleged agreement could not even agree that any material misrepresentations or omissions existed. There was nothing in the depositions to prove that Home/Graham had any intent to defraud investors. See depositions of Donald Auten, March 16, 1988; of Philip K. Glick, March 17, 1988, and

August 9, 1988; of Mark Strauss, August 16, 1988. In addition, the exhibits submitted by the plaintiffs were equally unconvincing. See letter from Philip Glick of the Graham Company to Mark Strauss dated September 20, 1984 {Auten #3}; September 25, 1984 [Auten #4]; and December 5, 1984 [Auten #9]. Accordingly, there is no evidence to support the state law claims which plaintiffs brought against Hibernia and Home/Graham.

Indemnity

The plaintiffs also sued to void their indemnity agreements and sought summary judgment on that issue. After considering the record, the briefs and arguments of counsel, and the applicable law, the Court denies plaintiffs' motion.

The plaintiffs first sought to void the indemnity agreements under Section 29(b) of the 1934 Act, 15 U.S.C. 78cc(b). A person can avoid a contract under Section 29(b) if he can show that (1) the contract involved a "prohibited transaction;" (2) the plaintiff is in contractual privity with the defendant; and (3) the plaintiff is in the class of persons the statute was designed to protect. Re-

gional Properties, Inc. v. Financial and Real Estate Consulting Company, 678 F. 2d 552, 559 (5th Cir. 1982). The plaintiffs did not make such a showing.

The plaintiffs tried to rescind the indemnification and security agreements, which involved no prohibited transactions. Plaintiffs made no allegations that misrepresentations were made in the indemnity agreements themselves. The guarantees were separate and independent ["legally discrete"] from the underlying transaction and were not affected by any fraud that might or might not have existed on the part of the Equity defendants.

Philip Glick, Graham vice president, stated in his affidavit that Graham had an agency agreement with Home to issue bonds and that Graham sent the PPM to the Duane Morris law firm to review. He further stated that Graham's actions were designed to assess Home's risk in guaranteeing the limited partnership notes, that nothing led Graham to believe that the PPM contained untrue or omitted material facts, and that Graham had

no contact with investors about their decision to invest in Courtside. John MacGregor, vice president of Home, stated in his affidavit that Home had an agency agreement with Graham, that Home had no contact with investors about their purchase decision, that Home reserved the right to approve the language in Financial Guarantee Bonds in order to protect its investment, and that Home had not been reimbursed for the funds it paid out when the investors defaulted on their notes.

Various correspondence between Home/Graham about the underwriting instructions and authority limitations for power of attorney and correspondence; between Graham and Equity about changes Graham wanted to see included in the PPM Supplement, as a result of the Duane Morris memorandum, were submitted. Significantly, an opinion letter from Sessions to Home about Courtside stated:

> Nothing has come to our attention, after inquiry, which would lead us to believe that the Memorandum (except for the financial statements and other financial and statistical data and the projections included therein, as to which we do not express any belief), on the

> date of the Memorandum, contained any untrue statement of a material fact or omitted to state a material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading. Record #667, Exhibit G to the Glick affidavit

The indemnity agreements were also not voided by Section 29(a) of the 1934 Act which prevented Home/Graham as surety from waiving any defenses that the plaintiffs had to payment of the note. Upon review of the indemnity agreement and the applicable law, the Court finds that Home/Graham did not waive all defenses of any kind the plaintiffs might have had against any party. The Home/Graham waiver provided that

> [Home] waives for the benefit of the Permitted Assignee [Banks] only all defenses of any kind with [Home] or any Principal [plaintiffs] might have with respect to any and all Note(s) or the obligation to pay any or all Note(s).... Id., Exhibit C to MacGregor affidavit.

Unlike the waiver provision in Jett v. Sunderman, 840 F. 2d 1487 (9th Cir. 1988),[8] the waiver provision in

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8 The waiver provision in Jett stated:
Defenses available to the Surety or any Principal against the Obligee or Permitted Assignee to deny payment of the Notes or of a claim under this Bond

Home/Graham's bond did not waive any defenses that might have been asserted against Courtside and the Equity Group principals. The waiver provision only precluded defenses that Home/Graham might have asserted against the banks based on acts or omissions of Courtside. Accord A & R Associates v. LaMarquis, Ltd., #86-3991 (E.D.La. 1988); A&D Partnership v. The Equity Group, Inc., #87-3139 (E.D.La. Dec. 23, 1988); Breaux v. The Equity Group, Inc., #872524 (E.D.La. Jan. 10, 1989); Waitz v. The Equity Group, Inc., #87 5633 (E.D.La. Jan. 24, 1989).

The plaintiffs relied on Louisiana state law to argue that the Court should void their indemnity agreements and deny a parallel motion of Home to enforce those same agreements. The plaintiffs argued that the bonds were accessory obligations under Louisiana suretyship articles; therefore, rescission of plaintiffs' notes by

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due to acts or omissions of the Obligee or Permitted Assignee, or other entity or person shall not be valid against the Permitted Assignee. Such defenses include but shall not be limited to ... the unenforceability of any note. 840 F. 2d at 1490, n. 1.

fraud nullified the principal obligations the notes represented and the extinction of the principal obligation extinguished Homes' suretyship obligation and any right of indemnity. La. C.C. arts. 3035 -3036. Furthermore, the plaintiffs argued that a surety who voluntarily paid before the lawsuit was filed and knew of a defense could not be reimbursed under Louisiana law.

As stated earlier, there were two separate and "legally discrete" transactions involved: the purchase of a limited partnership interest and the payment of a promissory note. The Home bonds guaranteed payments of the note without reference to the validity or invalidity of the underlying obligations for which payments were to be made. Home, a compensated surety, paid the notes when called upon by the bank to do so and thereafter sought to enforce an indemnity agreement.

Under Louisiana law, a contract is to be interpreted and enforced as written. Cappaert Enterprises v. Citizens and Southern International Bank of New Orleans, 486 F. Supp. 819 (E.D.La. 1980) [letter of credit];

Prestigiacomo v. Phoenix Inc. Co. of Hartford, 231 So 2d 431, 435-436 (La. App. 4th Cir. 1970) [construction bond.] In Ferrell v. South Central Bell Tel. Co., 403 So 2d 698, 700 (La. 1981), a case involving a personal guaranty of a corporation's phone service, the Louisiana Supreme Court stated:

> Contracts of guaranty or suretyship are subject to the same rules of interpretation as contracts in general. American Bank & Trust Co. v. Blue Bird Restaurant & Lounge, Inc., 279 So 2d 720 (La. App. 1st Cir. 1973)), aff'd, 290 So 2d 302 (La. 1974). Agreements legally entered into have the effect of laws on those who formed them and must be performed with good faith. La. Civ. Code art. 1901. Courts are bound to give legal effect to all such contracts according to the true intent of the parties, and this intent is to be determined by the words of the contract when these are clear and explicit and lead to no absurd consequences. La. Civ. Code art. 1945. All clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire act. La. Civ. Code art. 1955.

The cases on which plaintiffs relied are distinguishable.[9] Accordingly, the indemnity agreements remain valid as between the plaintiffs and Home/Graham.

By counterclaim, Home sought to enforce those same agreements and, like the plaintiffs, filed a motion for summary judgment on the indemnity question. Upon review of the language of the indemnity and security agreements, and by virtue of Home being a compensated surety, the Court finds that the bond and indemnity agreements are enforceable obligations unaf-

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9 Stonehill v. Security National Bank, 68 F.R.D. 24 (S.D.N.Y. 1975) concerned six loan transactions involving money secured by stock. The guarantors sued for lender violations of security regulations on maximum margin requirements on loans. The court stated that "if the principal obligation violates regulations then the guarantee of that obligation is void." In Stonehill, there were securities violations in the loans themselves. Likewise in Regional Properties, Inc. v. Financial and Real Estate Consulting Co., 678 F. 2d 552 (5th Cir. 1982), the selling broker was unregistered. In deciding that a prima facie case had been made for rescission of a securities broker contract, the Fifth Circuit stated that the "violation to trigger the application of Section 29(b) must have occurred in the making or performance of the contract sought to be rescinded. n Id. at 561, n. 16. In this case, the loans themselves did not violate the Regulations.

fected by any alleged wrongdoing of defendants. In National Union Fire Ins. Co. v. Turtur, supra, the court concluded that indemnity agreements were separate contracts and enforceable:[10] The language in the indemnity contract on which the Court relied was the warranty by the Turturs "that they are the owners of the limited partnership interest in which they grant National Union a security interest. This would not be possible if the partnership agreements in which the Turturs acquired those interests were not separate from the indemnity agreements." Id. at 98,591. That same language appears in the Home indemnity agreement:

> 1. The undersigned represents and warrants that:
>
> (a) He, she or it is the owner of one or more limited partnership interests in the Partner-

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10 The Turtur court explained, 1988 CCH Sec. L.R. Para. 93765 at p. 98,591:

> There being no allegation that National Union procured the indemnity agreements themselves by fraud, they are enforceable without regard to the rest of the claimed "package."

ship." Record #667, Exhibit H to the Glick affidavit.

There was no allegation that Home, through Graham, procured the indemnity agreements through fraud. It was only by reference to Equity's fault that any allegations of fraud attached to the indemnity agreements. As discussed earlier, that link cannot sustain liability on the part of Home/Graham.

Finally, as to the argument that Home cannot enforce the indemnity agreements because it paid the bank voluntarily, the Court finds that Home was not a volunteer. When plaintiffs defaulted, Home was bound to pay the notes on the banks' demand. When Home stepped in and paid the notes, the plaintiffs became bound to indemnify Home.[11]

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11 The proof of the debts owed under the indemnity agreements included (a) the affidavits of Philip Glick and John MacGregor which detailed the circumstances under which the indemnity agreements were issued; and (b) copies of the Financial Guarantee Bonds for Limited Partnerships #NB 771863 and Supplements with Hibernia National Bank as Permitted Assignee and the Financial Guarantee Bonds for Limited Partnerships #NB 771864 and Supplements with Security Savings and Loan Association as Permitted Assignee,

In summary, the Court finds that the bonds/indemnity agreements were separate from the limited investment so that even were the principal obligation eventually to have fallen, Home/Graham are still owed money on the bond which they-paid when the plaintiffs defaulted. Accordingly, the Court finds that Home/Graham can enforce the indemnity agreements against the plaintiffs.

The parties are to submit a judgment in accordance with the Court's decision.

New Orleans, Louisiana, this 5th day of January, 1990.

VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

---

which lists the investors, number of units and Sub-limit of liability in dollar amounts. The term of the bonds was to February 1, 1991. [Exhibit C to the MacGregor affidavit].

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WALTER R. ABBOTT, ET AL.,	*	CIVIL ACTION
	*	
VERSUS	*	NO. 86-4186
	*	
THE EQUITY GROUP, INC., ET AL.	*	c/w
	*	
	*	NOS. 86-4197, 86-4231
	*	87-3006, 87-3008,
	*	87-3009, 87-3645
	*	
	*	SECTION "L" (4)

ORDER

On motion of the Court, IT IS ORDERED that the Court's minute entry of January 9, 1990, in this consolidated action be amended as follows:

(1) The following paragraph replaces the first paragraph of the section of the minute entry beginning at p. 16 and entitled Indemnity:

> The plaintiffs also sued to rescind their indemnity agreements and Home filed a motion for summary judgment seeking to dismiss those very claims for rescission. After considering the record, the briefs and arguments of counsel, and the applicable law, the Court grants the defendant Home's motion and dis-

misses plaintiffs' claims for rescission of the indemnity agreements.

(2) The following two paragraphs replace the paragraph beginning at p. 21 of the Court's minute entry with the words "By counter claim, Home sought..." and the subsequent paragraph beginning at that same page with the words "In National Union Fire Ins. Co.... and ending at p. 22 of the Court's minute entry with the words "...liability on the part of Home/Graham":

> By counterclaim, Home sought to enforce those same agreements and filed a motion for summary judgment on the indemnity question. Upon review of the language of the indemnity and security agreements, and by virtue of Home being a compensated surety, the Court finds that the bond and indemnity agreements are enforceable obligations unaffected by any alleged wrongdoing of defendants. See e.g., Commercial Union Ins. Co. v. Melikyan, 430 So 2d 1217, 1221 (La. App. 1st Cir. 1983) ["The contract of indemnity forms the law between the parties and must be interpreted according to its own terms and conditions. See Grady v. Alfonso, 315 So 2d 832 (La. App. 4th Cir. 1975)."] Accord A & R Associates, supra at p. 4 [Absent proof of fraudulent acts on the part of National Union, "[t]he indemnity agreements are not nullified simply because National Union issued a bond which facilitated

financing on an underlying fraudulent transaction. (Citations omitted). n]; A & D Partnership, supra at pp. 23-24 ["The mere issuance of a Bond by National Union does not make National Union liable for the alleged fraud of others involved in the transaction....Thus, the investor's obligation under the Indemnity Agreement is unaffected by allegations of fraud with respect to the rest of the partnership transaction. (Citations omitted.)"]; Breaux, supra at p. 4 ["[U]nder Louisiana state law...'[f]raud committed by a third person vitiates the consent of a contracting party if the other party knew or should have known of the fraud.' Plaintiffs have asserted no claim nor submitted any evidence that...National Union knew or should have known of the alleged fraud. Thus, any fraud of Equity Group cannot be asserted against. . . National Union."]

There was no allegation that Home, through Graham, procured the indemnity agreements through fraud. It was only by reference to Equity's fault that any allegations of fraud attached to the indemnity agreements. As discussed earlier, that link cannot sustain liability on the part of Home/Graham.

(3) Footnote 10 which originally appeared at p. 21 of the Court's minute entry is deleted and footnote 11 as it originally appeared at p. 22 of the Court's minute entry is renumbered as footnote 10:

"...bound to indemnify Home.[10] "

New Orleans, Louisiana, this 13th day of March, 1990.

VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

---

[10] The proof of the debts owed under the indemnity agreements included (a) the affidavits of Philip Glick and John MacGregor which detailed the circumstances under which the indemnity agreements were issued; and (b) copies of the Financial Guarantee Bonds for Limited Partnerships #NB 771863 and Supplements with Hibernia National Bank as Permitted Assignee and the Financial Guarantee Bonds for Limited Partnerships #NB 771864 and Supplements with Security Savings and Loan Association as Permitted Assignee, both with a term to February 1, 1991, which lists the investors, number of units and Sub-limit of liability in dollar amounts [Exhibit C to the MacGregor affidavit].

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WALTER R. ABBOTT, ET AL.,*	*	CIVIL ACTION
	*	
VERSUS	*	NO. 86-4186
	*	
THE EQUITY GROUP, INC., ET AL.	*	c/w
	*	
	*	NOS. 86-4197, 86-4231
	*	87-3006, 87-3008,
	*	87-3009, 87-3645
	*	
	*	SECTION "L" (4)

Considering the Court's Reasons for Judgment of August 31, 1989 and January 8, 1990, its Minute Entries of September 12, 1989 and November 9, 1989, and its Order of March 19, 1990, its Order of September 19, 1991, and its Minute Entry of January 3, 1991;

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that there be Judgment against plaintiffs, Walter R. Abbott, Melvin G. Altschul, James E. Blazek, Edward I. Bluth, Don Lee Bradke, Alvin Cohen, Fred J. Corales, Errol W. Dauenhauer, Drake A. DeGrange, E-C Three (and against its partners, Harold A. Asher, Tho-

mas K. Winingder and Juan J. Gershanik, M.D. for their respective shares of said amounts, pursuant to Louisiana Partnership law), E-C Four and against its partner, Donald Palmer, for his share of said amounts, pursuant to Louisiana Partnership law), Michael S. Ellis, Fred J. Griffin, Lowell W. Hurwitz, Morris D. Kerstein, Louis R. Koerner, Marvin S. Kogutt, Steven D. Kraus, Arvind K. Kumra, Edward H. Lawson, Terrence J. Lestelle, Warren P. McKenna, Jerome T. Medley, David I. Namer, Ana C. Napoli, Gordon P. Nutik, Eugene M. Parrish, John E. Ray, Gerrard Raymond, Laurent J. Roger, Sr., George T. Schneider, Otto B. Schoenfeld, William G. Seiler, Sr., David E. Sibley, Ralph Slovenko, Rodney L. Somerville, Dasarathy Srinivas, Roy T. Staub, T.G. No. 1, Saroj Tampira, Lioyd A. Tate, Jr., Charles Teamer, K.O. Thaly, The Trio, James A. Tubre, Jr., E. Elizabeth Turnbull, John B. Vinturella, Vic Vybiral, John W. Wallin, Robert Lee Ward, Jay R. West, Milton Williams, Jr., and C.A. Wooley and in favor of defendants, The Home Insurance Company, The Graham Company, The Gerald

A. Teel Company and dismissing plaintiffs' complaints with prejudice.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that there be judgment against plaintiffs, E-C Three (and against its partners, Thomas K. Winingder and Juan J. Gershanik, M.D.), and in favor of defendant, Hibernia National Bank, dismissing plaintiffs' complaints with prejudice.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that there be judgment in favor of plaintiff, The Home Insurance Company, and against defendant/counterclaimant, Dominic C. Grieshaber;

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that there be judgment in favor of defendant/counterclaimant, The Home Insurance Company, and against plaintiffs, Walter R. Abbott, Melvin G. Altschul, James E. Blazek, Edward I. Bluth, Don Lee Bradke, Alvin Cohen, Fred J. Corales, Errol W. Dauenhauer, Drake A. DeGrange, EC Three (and against its partners, Harold A. Asher, Thomas K. Winingder and Juan J. Ger-

shanik, M.D. for their respective shares of said amounts, pursuant to Louisiana Partnership law), E-C Four and against its partner, Donald Palmer, for his share of said amounts, pursuant to Louisiana Partnership law), Michael S. Ellis, Fred J. Griffin, Lowell W. Hurwitz, Morris D. Kerstein, Louis R. Koerner, Marvin S. Kogutt, Steven D. Kraus, Arvind K. Kumra, Edward H. Lawson, Terrence J. Lestelle, Warren P. McKenna, Jerome T. Medley, David I. Namer, Ana C. Napoli, Gordon P. Nutik, Eugene M. Parrish, John E. Ray, Gerrard Raymond, Laurent J. Roger, Sr., George T. Schneider, Otto B. Schoenfeld, William G. Seiler, Sr., David E. Sibley, Ralph Slovenko, Rodney L. Somerville, Dasarathy Srinivas, Roy T. Staub, T.G. No. 1/ Saroj Tampira, Lloyd A. Tate, Jr., Charles Teamer, K.O. Thaly, The Trio, James A. Tubre, Jr., E. Elizabeth Turnbull, John B. Vinturella, Vic Vybiral, John W. Wallin, Robert Lee Ward, Jay R. West, Milton Williams, Jr., and C.A. Wooley, declaring that the Limited Partner Indemnity Agreements executed by each of them in favor of The Home Insurance Company are each valid, effective and enforceable;

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that there be judgment in favor of the plaintiff, The Home Insurance Company, and against defendant/counterclaimant, Dominic C. Grieshaber, declaring that the Limited Partner Indemnification Agreement executed by Dominic C. Grieshaber is valid, effective and enforceable.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that judgment be entered in favor of The Home Insurance Company and against Walter R. Abbott, Melvin G. Altschul, James E. Blazek, Edward I. Bluth, Don Lee Bradke, Alvin Cohen, Fred J. Corales, Errol W. Dauenhauer,

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that there be judgment in favor of The Home Insurance Company, and against Walter R. Abbott, Melvin G. Altschul, James E. Blazek, Edward I. Bluth, Don Lee Bradke, Alvin Cohen, Fred J. Corales, Errol W. Dauenhauer, Drake A. DeGrange, EC Three (and against its partners, Harold A. Asher, Thomas K. Winingder

and Juan J. Gershanik, M.D. for their respective shares of said amounts, pursuant to Louisiana Partnership law), E-C Four and against its partner, Donald Palmer, for his share of said amounts, pursuant to Louisiana Partnership law), Michael S. Ellis, Fred J. Griffin, Lowell W. Hurwitz, Morris D. Kerstein, Louis R. Koerner, Marvin S. Kogutt, Steven D. Kraus, Arvind K. Kumra, Edward H. Lawson, Terrence J. Lestelle, Warren P. McKenna, Jerome T. Medley, David I. Namer, Ana C. Napoli, Gordon P. Nutik, Eugene M. Parrish, John E. Ray, Gerrard Raymond, Laurent J. Roger, Sr., George T. Schneider, Otto B. Schoenfeld, William G. Seiler, Sr., David E. Sibley, Ralph Slovenko, Rodney L. Somerville, Dasarathy Srinivas, Roy T. Staub, T.G. No. 1/ Saroj Tampira, Lloyd A. Tate, Jr., Charles Teamer, K.O. Thaly, The Trio, James A. Tubre, Jr., E. Elizabeth Turnbull, John B. Vinturella, Vic Vybiral, John W. Wallin, Robert Lee Ward, Jay R. West, Milton Williams, Jr., and C.A. Wooley, as well as defendant/counterclaimant, Dominic C. Grieshaber, in the amounts set forth below, plus interest, at the legal rate fixed by Louisiana Civil Code Article 2924 from the date

each individual payment was made on that plaintiff's behalf by Home to Hibernia and Security Savings and Loan, as set forth in Exhibits "A" and "B" of the Stipulations filed herein on November 29, 1990, and attached hereto, until Home is reimbursed, plus attorney's fees and costs in the amount of $6,944.66 as to each plaintiff listed below:

Abbott, W.R.	$ 55,078.90
Altschul, M.G.	27,061.95
Blazek, J.E.	54,647.90
Bluth, E.I.	55,078.90
Cohen, A.	55,077.90
Corales, F.J.	27,538.95
Dauenhauer, E.D.	27,539.45
DeGrange, D.A.	24,128.95
E.C. Three	277,469.00

(and against its partners, Harold A. Asher, Thomas K. Winingder and Juan J. Gershanik, M.D. for their respective share of said amounts, pursuant to Louisiana Partnership law.)

E.C. Four 277,699.50

(and against its partner, Donald Palmer, for his share of said amounts, pursuant to Louisiana Partnership law.)

Ellis, Michael S.	27,323.45
Greishaber, Dominic C.	27,538.95

Griffin, Fred J.	27,538.95
Hurwitz, Lowell M.	27,539.45
Kerstein, Morris D.	49,670.90
Koerner, Louis R.	55,077.90
Kogutt, Marvin S.	27,538.85
Kraus, Steven D.	55,077.90
Kumra, Arvind K.	55,077.90
Lawson, Edward H.	27,323.45
Lestelle, Terrence J	27,538.95
McKenna, Warren P	27,538.95
Medley, Jerome T.	27,538.95
Namer, David I.	83,309.85
Napoli, Ana C.	27,538.95
Nutik, Gordon P.	82,616.85
Parrish, Eugene M.	27,323.45
Ray, John E.	82,616.85
Raymond Gerrard	55,077.90
Roger, Laurent J., Sr	27,538.95
Schneider, George T.	27,538.95
Schoenfeld, Otto B.	27,538.95
Seiler, William G., Sr.	110,155.80
Sibley, David E.	27,538.95
Slovenko, Ralph	25,939.95
Somerville, Rodney L.	54,646.90
Srinivas, Dasarathy	27,323.45
Staub, Roy T.	20,156.35
T.G. No. 1	109,295.80
Tampira, Saroj	51,135.90
Tate, Lloyd A., Jr.	27,538.95
Teamer, Charles	55,077.90
Thaley, K.G.	54,646.90
The Trio	55,077.90
Tubre, James A., Jr.	27,538.95
Turnbull, E. Elizabeth	275,394.50
Vinturella, John B.	27,323.95

Vybiral, Vic	27,538.95
Wallin, John D.	55,077.90
Ward, Robert Lee	54,646.90
West, Jay R.	27,323.45
Williams, Gene B., Jr.	27,538.95
Wooley C.A.	27,538.95

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that judgment be entered in favor of Hibernia National Bank and against E-C Three Partnership in the amount of $89,000.50 in principal and interest, and $31,666.66 in attorney's fees and costs and against its partners, Thomas K. Winingder and Juan J. Gershanik, M.D. for their respective shares of said amounts pursuant to Louisiana partnership law.

New Orleans, this 30 day of January, 1992.

VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WALTER R. ABBOTT, ET AL.,*	CIVIL ACTION	
	*	
VERSUS	*	NO. 86-4186
	*	
THE EQUITY GROUP, INC., ET AL.	*	c/w
	*	
	*	NOS. 86-4197, 86-4231
	*	87-3006, 87-3008,
	*	87-3009, 87-3645
	*	
	*	SECTION "L" (4)

WEDNESDAY, MARCH 11, 1992 10:00 A.M.

MOTION OF PLAINTIFFS E-C THREE AND ITS PARTNERS JUAN J. GERSHANKI,. M.D. AND THOMAS WININGDER FOR NEW TRIAL.

ARGUED. DENIED

MOTION OF WALTER ABBOTT, ET AL E-C THREE AND E-C FOUR (AND THEIR RESPECTIVE PARTENRS) AND DOMINIC GREISHABER EOR NEW TRIAL

ARGUED. DENIED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WALTER R. ABBOTT, ET AL.,	*	CIVIL ACTION
	*	
VERSUS	*	NO. 86-4186
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	*	
	*	NOS. 86-4197, 86-4231
	*	87-3006, 87-3008,
	*	87-3009, 87-3645
	*	
	*	SECTION "L" (4)

WEDNESDAY, JUNE 3, 1992 10:00 A.M.

MOTION FOR STAY EXECUTION OF JUDGMENT PENDING APPEAL

ARGUED, DENIED.

MOTION OF MRS. TURNBULL TO SUPPLEMENT THE RECORD.

ARGUED, DENIED.

United States Court of Appeals,
Fifth Circuit.
No. 92-3376.

Walter R. ABBOTT, M.D., et al., Plaintiffs-Appellants,

and

Mrs. E. Elizabeth Turnbull and, Louis R. Koerner,
Plaintiffs-Appellants,

v.

The EQUITY GROUP, INC., et al., Defendants,

The Home Insurance Company and, the Graham Company,
Defendants-Appellees

In re Ronald C. ELLINGTON, et al., Debtors.

Mrs. E. Elizabeth Turnbull and, Louis R. Koerner,
Claimants-Appellants.
Sept. 28, 1993.

Appeals from the United States District Court for the
Eastern District of Louisiana.

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 9/28/93, 5 Cir., E.D. LA., 2 F.3d 615)

(November 12, 1993)

Before REAVLEY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of members of the Court and a majority of the Circuit judges who are in regular active service not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

( ) A members of the in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ RHESA BARKSDALE
United States Circuit Judge

...e Court, U.S.
F I L E D
FEB 8 1994
OFFICE OF THE CLERK

No. 93-1136

In The

Supreme Court of the United States

October Term, 1993

E. ELIZABETH TURNBULL, et al.,

Petitioners,

versus

THE HOME INSURANCE COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Petitioners have presented two separate questions for review (Petition at i). For the reasons indicated in this opposition brief, respondents submit that the following is a fair and accurate restatement of the real question presented for review:

> Did the district court abuse its discretion in refusing to consider a new legal theory raised for the first time in a supplemental memorandum in support of a motion for new trial when that theory required the assertion of legal issues not previously raised during six years of litigation, the introduction of additional evidence, anaylsis of a different law, and when the petitioners failed to provide an explanation for their failure to raise this issue during six years of litigation?

STATEMENT REQUIRED BY RULE 29.1

This Brief in Opposition to Petition for Certiorari is filed on behalf of The Home Insurance Company ("The Home") and The Graham Company ("Graham"). Home Holdings, Inc. is the parent company of The Home. Neither The Home nor Graham has any subsidiaries other than wholly-owned subsidiaries.

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CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinions and judgments of the District Court and Fifth Circuit Court of Appeals are contained in Petitioners' Appendix to their Petition for a Writ of Certiorari. All references by Respondents in this opposition brief will be to those contained in Petitioners' Appendix.

STATEMENT OF THE CASE

This Petition relates solely to the district court's disposition of the petitioners' belated attempt to interject a new legal theory into this litigation prior to the hearing on the petitioners' motion for new trial.[1] The petitioners' cursory statement of the procedural history of this issue is largely accurate, as far as it goes (Petition at 1-2). However, respondents believe it is necessary to more fully detail the nature and timing of the petitioners' late-filed claim.

Written reasons for the district court's grant of summary judgment in favor of The Home and Graham were

[1] The new theory was that respondents, The Home and Graham, had aided and abetted a violation of Rule 10b-9 issued under Section 10(b) of the Securities and Exchange Act of 1934. Petitioners have assumed, as they obviously must: (1) that a private cause of action exists under Rule 10b-9, and (2) that a cause of action exists for aiding and abetting a violation of Rule 10b-9. However, this Court has not yet determined whether Rule 10b-9 actually provides a private cause of action, a question also yet to be answered by the court below, and whether such a cause of action, if it exists, supports a claim for aiding and abetting. Pet. App. at 65, 66 n.58.

issued in January 1990. Over the following two years, the parties disputed amounts due The Home and, consequently, judgment was not entered against the petitioners until January 31, 1992. Petitioners then timely moved on February 10, 1992, for a new trial pursuant to Federal Rule of Civil Procedure 59. Petitioners' motion for new trial restated arguments raised in their pre-judgment motions and did not mention Rule 10b-9.

A claim based on Rule 10b-9 was not raised until March 27, 1992, when petitioner Turnbull's newly enrolled counsel filed a motion for leave to file a supplemental memorandum in support of the original February 10, 1992, motion for new trial.[2] On April 7, 1992, the parties argued the merits of the original motion for new trial which the district court denied. The district court, finding that the Rule 10b-9 claim had not been raised in six years of litigation, refused to consider this new theory. This chronology of events is set out in the opinion of the court below and is not disputed by the petitioners. Pet. App. at 17-18, 59-62.[3]

Respondents point out that the petitioners' "Statement of Necessary Facts" is nothing more than verbatim excerpts from briefs filed by the petitioners in the court below and, in any event, is irrelevant. The issue raised in the Petition, and the question before the court below, is not whether there were any "facts" in the record which might have supported a claim based on Rule 10b-9, but

---

[2] The other petitioners adopted the arguments made in the supplemental memorandum.

[3] In fact, petitioners concede in this Court that the 10b-9 theory was a new theory. Pet. at 2.

whether the court below abused its discretion in refusing to consider the legal claim that these facts allegedly support.

As the Fifth Circuit concluded:

> The court was under no obligation to permit appellants to interject a new legal theory, without explanation, after they had failed to do so during three years of discovery, two additional years between the court's granting summary judgment and entering judgment, and almost two months following that entry. Pet. App. at 66.

REASONS FOR DENYING THE WRIT

Petitioners have utterly failed to demonstrate the existence of any grounds for granting their petition.

1. The Decision Below is in no Way in Conflict With the Decisions of Other Circuits.

Petitioners apparently do not dispute that the district court is given discretion to consider new legal theories and that the proper standard for review is the abuse of discretion standard.[4] Rather, petitioners list a variety of circumstances or instances in which courts allegedly permitted consideration of new legal theories.

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[4] See, *Lavespere v. Niagara Machine & Tools Works, Inc.*, 910 F.2d 167, *reh. den.*, 920 F.2d 259 (5th Cir. 1990), *cert. den.*, 114 S.Ct. 171, 126 L.Ed. 2d 131 (1993).

Petitioners' argument and supporting list of authorities misses the point since, in its decision below, the Fifth Circuit did not rule that district courts were precluded in all circumstances from considering legal theories raised for the first time in a post-judgment motion. To the contrary, the Fifth Circuit explicitly stated in a footnote that a district court may, in fact, use its "considerable discretion" to consider a new legal theory on a post-judgment motion. Pet. App. at 66, n.59.

The decision below simply held that, given the record before the district court and the undisputed facts concerning the timing and nature of the new legal theory, the district court was well within its discretion in refusing to consider petitioners' late-filed claim.

Indeed, petitioners do not dispute the Fifth Circuit's finding that they failed to mention Rule 10b-9 during three years of discovery, two additional years between the district court's granting summary judgment and entering judgment, and nearly two months following that entry of judgment. Nor do petitioners take issue with the Fifth Circuit's finding that they failed to provide an explanation for their failure to timely raise the 10b-9 issue.

Petitioners apparently place great emphasis on cases in which the new legal theory was purely one of law and required no new or amplified factual determination. The decision below can hardly be in conflict with these cases since petitioners' 10b-9 argument unquestionably required the introduction and analysis of new evidence.

As noted by the Fifth Circuit, Mrs. Turnbull attempted to file a supplemental memorandum with

attached deposition excerpts and exhibits in support of her motion for inclusion in the record for appeal purposes. Following that, Mrs. Turnbull attempted to file a second motion to supplement with approximately with one hundred fifty pages of deposition excerpts relating to her Rule 10b-9 theory. Pet. App. at 64, n.57. Obviously, if the Rule 10b-9 theory was purely one of law and required no new or amplified factual determinations, there would have been no reason for Mrs. Turnbull's two attempts to supplement the record with hundreds of pages of deposition excerpts and other materials.

2. In Deciding the Question at Issue, the Fifth Circuit Adhered to Settled Principles of Law in Reaching the Correct Result Based on Particular Facts.

The decision below applied accepted legal principles to special facts in order to reach the correct result. The Fifth Circuit held that the district court did not abuse its discretion in refusing to consider the 10b-9 argument given the applicable facts: the basis for the motion, the length of delay, and the lack of explanation for not having timely raised the issue. Pet. App. at 62-63.

Far from demonstrating any decisional conflict or aberration, this case turns on its particular facts and merits no consideration from this Court of a considered and correct application of settled rules of federal civil procedure.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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